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**OPINION, U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
(FEBRUARY 24, 2026)**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKSON WELLS, as Personal Representative for
the Estate of Thomas E. Wells, deceased; JUDITH
HEMPHILL, as Personal Representative for the
Estate of Joyce H. Walder, deceased,

Plaintiffs-Appellees,

v.

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant-Appellant.

No. 24-4802

D.C. No. 4:21-cv-00097-BMM

Appeal from the United States District Court for the
District of Montana Brian M. Morris,
Chief District Judge, Presiding

Argued and Submitted
October 21, 2025 Portland, Oregon

Before: Consuelo M. CALLAHAN,
Morgan B. CHRISTEN, and Andrew D. HURWITZ,
Circuit Judges.

Opinion by Judge Christen;
Concurrence by Judge Callahan

OPINION

CHRISTEN, Circuit Judge:

From 1922 to 1990, BNSF Railway Company was required by federal law to transport asbestos-containing vermiculite from the world's largest vermiculite mine to its railyard in Libby, Montana, and from there to destinations nationwide. Thomas Wells and Joyce Walder were former residents of Libby who developed mesothelioma from asbestos exposure. Their estates asserted negligence and strict liability claims against BNSF arising from its transportation of vermiculite and sought compensatory and punitive damages. After a ten-day trial, the jury returned a verdict for Plaintiffs on their strict liability claims but in favor of BNSF on Plaintiffs' negligence claims. The jury did not award punitive damages.

On appeal, BNSF argues that the common carrier exception shields it from strict liability. Plaintiffs counter that BNSF was not acting as a common carrier when it allowed vermiculite that contained asbestos to accumulate in its railyard. In the alternative, Plaintiffs ask us to certify to the Montana Supreme Court the question whether the common carrier exception applies to BNSF's actions.

We conclude that BNSF is protected from strict liability by the common carrier exception. Plaintiffs' claims arose from activities BNSF engaged in while pursuing its statutorily imposed duty as a common carrier. Separately, we conclude that certification is unwarranted. We therefore reverse the district court's

judgment and remand with instructions to enter judgment for BNSF.

I.

A.

Between 1922 and 1990, the world's largest source of vermiculite was a mine located approximately seven miles outside of Libby, Montana. Vermiculite is a mineral that was commonly used during that period for fireproof roofing, insulation, and wallpaper.

For the most part, two companies were involved in the extraction, processing, and shipment of vermiculite from Libby: W.R. Grace & Company and BNSF. W.R. Grace extracted vermiculite from a mine outside of Libby from 1963 to 1990, and processed raw vermiculite ore to remove impurities. This created vermiculite concentrate and leftover waste, or tailings.

It is now known that the concentrate contained asbestos fibers. Processing the vermiculite ore into concentrate decreased the amount of asbestos in the material, but the exact extent of this reduction was contested at trial. By one measure, the raw vermiculite ore contained up to twenty-six percent asbestos, and evidence showed that the tailings could contain up to eighty percent.

BNSF was required by federal law to transport W.R. Grace's vermiculite concentrate upon request. 49 U.S.C. § 11101(a). W.R. Grace filled empty railcars with concentrate at the mine site and sealed them before BNSF hauled the cars to its Libby railyard. The railyard spanned approximately twenty acres in the

northern downtown area. From the railyard, BNSF shipped the railcars nationwide.

Initially, W.R. Grace certified on bills of lading prepared for each railcar that the vermiculite concentrate shipments were not hazardous. The Montana Department of Environmental Quality reported as late as 1974 that asbestos was removed by processing vermiculite ore into concentrate. However, evidence at trial showed that by 1977, W.R. Grace posted placards on at least some railcars stating that the vermiculite concentrate inside contained asbestos. It was not until decades later, in 2000, that the Environmental Protection Agency (EPA) began an extensive cleanup in Libby pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 (CERCLA). *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1232 (9th Cir. 2005) (summarizing the EPA's response to the "truly extraordinary" situation in Libby as "no mere run-of-the-mill CERCLA cleanup," but rather, "a unique removal action of a size and cost not previously seen").

At trial, the evidence showed that asbestos-containing vermiculite escaped from railcars during the regular course of transportation and also during railcar switching operations in the railyard. The evidence further demonstrated that vermiculite pervaded downtown Libby. W.R. Grace stored vermiculite in an export plant in the downtown area and donated tailings to spread over a local baseball field to absorb rainwater. Unaware of the danger, many Libby residents used vermiculite in a variety of ways in their homes and on their lawns.

Thomas Wells worked for the Forest Service in Lincoln County, Montana from June through September

and most of November in 1978 and also from July to August in 1981. Between June to November in 1978, he lived in a trailer home abutting BNSF's railyard. Joyce Walder lived in Libby from 1954 to 1972 and from 1976 to 1978, then visited periodically through 2009. During her childhood, Walder frequented the baseball and football fields and the running track near the railyard. She also walked across the railyard and swam in the city pool, which was located near the railyard.

The jury found that Plaintiffs had been exposed to asbestos. Both Wells and Walder were diagnosed with mesothelioma, a cancer caused by exposure to asbestos that affects tissues surrounding the lungs. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 142 & n.4 (2003). Tragically, each died within months after receiving this diagnosis.

B.

In 2021, the personal representatives of Plaintiffs' estates filed this action against BNSF in the United States District Court for the District of Montana, asserting negligence and strict liability claims.

Two divergent narratives of BNSF's activities in Libby emerged. Before trial, BNSF sought summary judgment on Plaintiffs' strict liability claims, arguing that it had acted pursuant to its statutorily imposed duty as a common carrier when it transported vermiculite concentrate. Plaintiffs argued that BNSF had not acted as a common carrier when it stored "reservoirs" of asbestos and asbestos contaminated materials at [its] Libby railyard." The district court denied BNSF's motion, reasoning that if Plaintiffs could establish their allegations at trial, "harbor[ing]

a toxic asbestos dump in the Libby railyard” would be “removed from BNSF’s role as a [common] carrier of vermiculite.”

A ten-day jury trial commenced in Helena in April 2024. In contrast to their opposition to BNSF’s motion for summary judgment, Plaintiffs’ opening statement made no mention of BNSF storing vermiculite or reservoirs of asbestos on its property. After opening statements, the district court expressed “serious questions about the viability of [Plaintiffs’] strict liability claim,” because its initial understanding that “the material was . . . stored at the railyard, and then loaded on railcars” now “seem[ed] to be erroneous.” As trial progressed, testimony showed that BNSF did not store vermiculite ore or concentrate at its Libby railyard, but asbestos dust had nonetheless accumulated on BNSF’s property. At the close of Plaintiffs’ case, the district court questioned whether Plaintiffs’ theory of BNSF’s liability was actually premised on BNSF’s “inactivity” for failing to properly maintain the railyard. BNSF moved for judgment as a matter of law on Plaintiffs’ strict liability claims, again invoking the common carrier exception. The court denied the motion, explaining its view that “[n]othing under BNSF’s duty as a common carrier prevented [BNSF] from periodically cleaning the railyard, or from improving its facilities to capture vermiculite dust for safe disposal.” During closing argument, Plaintiffs’ counsel characterized BNSF’s conduct underlying their lawsuit as “the condition of [BNSF’s] yard.”

The jury rejected Plaintiffs’ negligence claims and request for punitive damages, but it found in Plaintiffs’ favor on their strict liability claims and awarded \$4,000,000 in compensatory damages to

each estate. The district court denied BNSF's renewed motion for judgment as a matter of law on Plaintiffs' strict liability claims, and BNSF timely appealed.

This lawsuit is one of many concerning asbestos exposure in Libby. Initially, many individuals who claimed to have been exposed to asbestos in the Libby area sued W.R. Grace, but in 2001, W.R. Grace declared bankruptcy and placed \$2.9 billion in an irrevocable trust to settle all present and future claims. According to BNSF, after W.R. Grace declared bankruptcy, hundreds of lawsuits were filed against BNSF. *See, e.g., BNSF Ry. Co. v. Eddy*, 459 P.3d 857 (Mont. 2020); *Gallegos v. BNSF Ry. Co.*, No. 22-68, 2023 WL 8187923 (D. Mont. Nov. 27, 2023). This is the first such lawsuit to go to trial.¹

II.

The district court had jurisdiction to hear Plaintiffs' claims in this diversity action pursuant to 28 U.S.C. § 1332. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 and review de novo the district court's interpretation of state law. *Casun Inv., A.G. v. Ponder*, 119 F.4th 637, 642 (9th Cir. 2024), *cert. denied sub nom. NVWS Props., LLC v. Casun Inv., A.G.*, 145 S. Ct. 1927 (2025).

¹ Another has been stayed pending the resolution of this appeal. *See Moe v. BNSF Ry. Co.*, No. 9:22-cv-00068-DLC, Stay Order, ECF # 141 (D. Mont. May 1, 2024).

III.

A.

Decades ago, Montana adopted §§ 519 and 520 of the Restatement (Second) of Torts, which outline strict liability for abnormally dangerous activities. *See Matkovic v. Shell Oil Co.*, 707 P.2d 2, 4 (Mont. 1985). Section 519 provides:

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

Restatement (Second) of Torts § 519 (A.L.I. 1977). Section 520 provides six factors to consider when determining whether an activity is abnormally dangerous:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and

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

Though a court must consider all factors, all factors “need not be present” for an activity to qualify as abnormally dangerous. *Covey v. Brishka*, 445 P.3d 785, 792 (Mont. 2019).

Recently, in another case against BNSF for personal injuries caused by exposure to asbestos in Libby, the Montana Supreme Court also adopted § 521 of the Second Restatement, which provides for an exception to strict liability for common carriers. *See Eddy*, 459 P.3d at 873–74. The common carrier exception bars the imposition of “strict liability for abnormally dangerous activities . . . if the activity is carried on in pursuance of a public duty imposed upon the actor . . . as a common carrier.” Restatement (Second) of Torts § 521 (A.L.I. 1977). This exception addresses concerns that “it would be unjust to subject a common carrier to strict liability for any danger done by a material the carrier is required to transport by law.” *Eddy*, 459 P.3d at 873. Accordingly, Montana law applies the exception to abnormally dangerous activities “carried on in pursuance of a public duty” when “that public duty is imposed on the actor as a common carrier.” *Id.* at 874.

B.

We begin from the premise that BNSF’s transportation of vermiculite concentrate was an abnormally dangerous activity. The district court ruled that BNSF was precluded from arguing otherwise by the Montana Supreme Court’s decision in *Eddy*, 459 P.3d at 868–73, and BNSF does not challenge that ruling on appeal. Rather, BNSF argues only that the

common carrier exception exempts it from strict liability. BNSF contends that the district court construed the common carrier exception too narrowly, interpreting it to apply only to “public-duty-imposed common carrier activities.” More specifically, BNSF argues that the district court erred by ruling that it was ineligible for the common carrier exception on the grounds that BNSF did not act pursuant to a public duty when it failed to maintain its railyard and tracks where asbestos collected.

We agree that the district court interpreted the scope of the common carrier exception too narrowly.²

² The concurrence addresses preemption of the strict liability claims by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), Pub. L. 104-88, 109 Stat. 803, an issue we do not reach because we can resolve this appeal on the common carrier exception and the scope of ICCTA’s potential preemption was not adequately briefed. As the concurrence notes, the parties did not address whether the ICCTA would preempt other state law claims, such as negligence, because the jury did not find BNSF negligent and Plaintiffs did not appeal that adverse finding. At oral argument before our court, BNSF equivocated on the scope of the ICCTA’s proposed preemption; specifically, whether it might apply to negligence. The common carrier exception provides a simpler ground for resolution of this appeal and does not implicate the same federalism concerns that attend preemption of state laws of general applicability. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *see also Moore v. Trader Joe’s Co.*, 4 F.4th 874, 880 (9th Cir. 2021) (affirming dismissal of state law claims on the basis that the complaint failed to state a claim and declining to reach federal preemption). By declining to reach preemption, we adhere to the principle of judicial restraint that “if it is not necessary to decide more, it is necessary not to decide more.” *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (quoting *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir.

As adopted by Montana and the vast majority of states, the exception shields common carriers from strict liability for harm caused during transport “because common carriers must accept, carry, and deliver all goods offered to them for transport within the scope of the operating authority set forth in their permits.” *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986, 1006 (9th Cir. 2008).³ Unlike private shippers, common carriers “cannot discriminate against customers or refuse to accept commodities that may be dangerous for transport.” *Id.* *Eddy* explained that a common carrier is not strictly liable for dangers inherent in “a material the carrier is required to transport by law.” 459 P.3d at 873. *Eddy* also held that as a rail carrier, BNSF qualifies as a common carrier for the purposes of the common carrier exception. *Id.* at 874.

The parties do not dispute that the “asbestos-contaminated vermiculite entered the Libby railyard via BNSF’s transport.” The jury heard testimony that vermiculite dust fell “along the tracks and within the railyard” after it escaped from railcars during car switching operations and during transport along the

2004) (Roberts, J., concurring in part and concurring in judgment)).

³ *Eddy* recognized that this exception has been broadly adopted. 459 P.3d at 873; see, e.g., *Pecan Shoppe of Springfield, Inc. v. Tri-State Motor Transit Co.*, 573 S.W.2d 431, 435 (Mo. Ct. App. 1978); *Town of East Troy v. Soo L. R.R. Co.*, 409 F. Supp. 326, 330 (E.D. Wis. 1976); *Christ Church Parish v. Cadet Chem. Corp.*, 199 A.2d 707, 708 (Conn. Super. Ct. 1964); *Albig v. Mun. Auth. of Westmoreland Cnty.*, 502 A.2d 658, 663 (Pa. Super. Ct. 1985); *Ruiz v. S. Pac. Transp. Co.*, 638 P.2d 406, 412 (N.M. Ct. App. 1981); *Peneschi v. Nat’l Steel Corp.*, 295 S.E.2d 1, 5 (W. Va. 1982); *Cairl v. St. Paul*, 268 N.W.2d 908, 911 (Minn. 1978); *Voelker v. Delmarva Power & Light Co.*, 727 F. Supp. 991, 994 (D. Md. 1989).

railroad. Federal law defines “transportation” broadly to include “delivery,” “storage,” “handling,” and “services related to [the] movement” of property. 49 U.S.C. § 10102(9). Plaintiffs’ theory of liability thus stems directly from BNSF’s statutory duty to transport vermiculite concentrate. *See id.* at § 11101(a).

Plaintiffs attempt to distinguish the condition of BNSF’s railyard from BNSF’s role as a common carrier, because escaped asbestos that accumulated in BNSF’s railyard was no longer in transit. Plaintiffs argue that the escaped asbestos constituted an abnormally dangerous condition on the land for which BNSF should be strictly liable as a property owner. In support, Plaintiffs cite *Covey*, a case in which the Montana Supreme Court concluded that maintaining a man-made fishpond on a mountainside was an abnormally dangerous condition that triggered strict liability. 445 P.3d at 790–91. This analogy is inapt. *Covey* involved the voluntary maintenance of a man-made 4.5-million-gallon fishpond for private purposes, upslope from other property owners. *Id.* at 789. The *Covey* defendant was held strictly liable after his “pond breached its banks and . . . [t]he water carried boulders, trees, and other debris downhill[,] . . . carv[ing] large channels into the hillside.” *Id.* In contrast, the dangerous condition here—accumulated asbestos dust—arose solely from BNSF’s operation as a common carrier executing its federally mandated duty to transport vermiculite. *Cf. Anderson v. BNSF*, No. ADV-2008-101, 2010 Mont. Dist. LEXIS 73, at *4 (Mont. Dist. Feb. 2, 2010) (concluding that the common carrier exception immunized BNSF from strict liability for diesel fuel stored at BNSF’s railyard that leaked to

surrounding property because storing fuel “is an integral part of its operation as a common carrier”).

The result we reach today is consistent with *Town of East Troy v. Soo Line Railroad Company*, 409 F. Supp. 326, 328 (E.D. Wis. 1976), which the *Eddy* court cited with approval. *See Eddy*, 459 P.3d at 873. *Town of East Troy* involved a train that derailed while transporting hazardous acid. 409 F. Supp. at 328. The railroad company waited nine days before attempting to remove acid-contaminated soil from the derailment site, and that delay allowed the spill to foul the surrounding community’s groundwater supply. *Id.* at 330. The plaintiff in *Town of East Troy* alleged that the railroad company “knew or should have known” that it was engaged in an abnormally dangerous activity by transporting hazardous acid. *Id.* But the district court dismissed the claim because it concluded that the common carrier exception shielded the company from strict liability. *Id.*; *see also Walsh v. Mont. Rail Link*, 2001 ML 1418, 2001 Mont. Dist. LEXIS 3033, at *21–22 (Mont. Dist. May 8, 2001) (holding that the common carrier exception immunized a rail company from strict liability for injuries resulting from toxic chemicals spilled when a train derailed); *Griffin v. Mont. Rail Link*, 2000 ML 2438, 2000 Mont. Dist. LEXIS 1331, *2 (Mont. Dist. Aug. 29, 2000) (same).

This caselaw strongly supports the conclusion that BNSF is entitled to the protection afforded by the common carrier exception because it is uncontested that the asbestos dust that accumulated in BNSF’s railyard leaked or escaped from rail cars during BNSF’s required transportation of vermiculite concentrate. The fact that the dust accumulated gradually along the railroad tracks and in BNSF’s railyard, rather than spilling

abruptly, does not alter our analysis because the gradual spillage still occurred during BNSF's shipment of vermiculite.

In reaching the opposite conclusion, the district court emphasized that Montana does not apply the common carrier exception when a common carrier engages in “abnormally dangerous activit[ies] for ‘its own purposes’” rather than in “pursuance of a public duty,” *Eddy*, 459 P.3d at 875 (quoting *Murphy-Fauth v. BNSF Ry. Co.*, No. 17-79, 2018 WL 3601235, at *2 (D. Mont. July 27, 2018)).⁴ The court reasoned that no public duty obligated BNSF to “maintain[] uncon- tained asbestos-containing material open air on its property,” and that BNSF allowed accumulated dust to remain in the railyard for its own gain because foregoing maintenance of the yard increased revenue and prevented transportation delays. The district court analogized this case to *In re East Palestine Train Derailment*, a case decided by the United States District Court for the Northern District of Ohio in which a railroad company “transport[ed] over a million pounds of hazardous chemicals and,” after a derailment, “intentionally set[] fire to them in a residential neighborhood.” No. 4:23-cv-0242-BYP, 2024 WL 1096064, at *10 (N.D. Ohio Mar. 13, 2024). Crucial

⁴ The plaintiff in *Murphy-Fauth* alleged injury from asbestos exposure as a result of BNSF's activities in Libby. See *Murphy-Fauth*, 2018 WL 3601235, at *1–2. The plaintiff's allegations extended beyond just the transport of vermiculite and included allegations that “BNSF played a central role in the vermiculite operations in Libby” by collaborating with W.R. Grace to “develop[] new uses for vermiculite products and assist[] in marketing.” See D. Mont. No. 17-cv-00079-BMM-JTJ, Dkt. No. 63 ¶ 23. The district court denied BNSF's motion to dismiss, but the parties settled shortly thereafter. *Id.* at *4.

to the *East Palestine* court's conclusion that the common carrier exception did not apply was the fact that, in responding to the spill, the railroad company "voluntarily undertook activities for [its] own purpose; namely to release and burn vinyl chloride in order to get the derailed cars out of the way to start . . . trains running through East Palestine again to earn revenue." *Id.* at *11. Unlike the situation in *East Palestine*, here the district court cited no evidence, and on appeal Plaintiffs point to no evidence, that BNSF aimed to save money by not cleaning its railyard. Indeed, for decades, even the Montana Department of Environmental Quality advised that vermiculite concentrate did not contain asbestos.

The district court adopted Plaintiffs' characterization of BNSF's "abnormally dangerous activity" as "maintain[ing] asbestos on its property." Plaintiffs framed BNSF's conduct as an affirmative act ("maintaining"), but their theory of strict liability was actually premised on BNSF's alleged "fail[ure] to take measures to prevent toxic dust from collecting upon and escaping from its property." That theory, which assumes that the risk of harm would have been eliminated if BNSF had "adequately clean[ed]" its railyard, effectively treats Plaintiffs' strict liability claims as negligence claims. To be sure, the Montana Supreme Court has explained that the common carrier exception would not have shielded BNSF from a negligence claim, *Eddy*, 459 P.3d at 874, but the jury expressly rejected Plaintiffs' negligence theory and found that BNSF "exercise[d] reasonable care in its handling of asbestos."

C.

Plaintiffs chose to file this action in federal court, but on appeal they urge us to certify to the Montana Supreme Court the question whether Montana’s common carrier exception for strict liability encompasses BNSF’s failure to maintain its railyard.⁵ We decline to do so.

A federal court sitting in diversity is empowered “to decide questions of state law.” *Abraham v. Corizon Health, Inc.*, 985 F.3d 1198, 1202 (9th Cir. 2021). “However, if state law permits it, we may exercise our discretion to certify a question to the state’s highest court.” *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019) (en banc). The Montana Supreme Court permits certification of questions of law from federal courts when “[t]he answer may be determinative of an issue in pending litigation in the certifying court” and “[t]here is no controlling appellate decision, constitutional provision, or statute of this State.” Mont. R. App. P. 15(3).

In deciding whether to certify a question, we consider “(1) whether the question presents ‘important public policy ramifications’ yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court’s caseload; and (4)

⁵ Specifically, Plaintiffs ask this panel to certify the following question:

Does Montana’s common carrier exception to strict liability for an abnormally dangerous activity or condition immunize BNSF from strict liability for harm caused by asbestos in or on its Libby railyard, when the prolonged presence of this toxic substance in and on its Libby railyard was not required by BNSF’s statutory duties as a common carrier?

‘the spirit of comity and federalism.’” *Murray*, 924 F.3d at 1072 (quoting *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003)). Because certification burdens state courts and the parties and can prolong litigation, we do not invoke it lightly. *Id.* Moreover, we have explained that “[w]hen there is little reason to doubt the answer to a state-law question, we ought not outsource our work to a state court.” *Bliss Sequoia Ins. & Risk Advisors, Inc. v. Allied Prop. & Cas. Ins. Co.*, 52 F.4th 417, 423 (9th Cir. 2022).

In *Eddy*, the Montana Supreme Court applied the common carrier exception to “the manner in which [BNSF] conducted the transport of vermiculite,” reasoning that “BNSF is entitled to the common carrier exception for strict liability imposed as a result of its transporting of vermiculite, which it was required to do by law.” *Id.* at 874. *Eddy* remanded to the trial court to determine whether BNSF’s *other* activities fell within the scope of the exception. *Id.* at 875. The complaint in *Eddy* alleged that BNSF’s other actions included “industrial activities” such as disturbance of asbestos and collaboration with W.R. Grace to “strategize regarding distribution of the product and geologic sampling,” as well as other undertakings “not required of a common carrier.” *Eddy*, 459 P.3d at 864 & n.1, 873. *Eddy* leaves little doubt that the outcome of this case is controlled by the common carrier exception because Plaintiffs complain about the deposit of asbestos-containing vermiculite along the tracks and in the Libby railyard, and the asbestos-containing vermiculite fell on the tracks and entered the railyard during the course of BNSF’s transportation of vermiculite concentrate. In other words, Plaintiffs attempt to hold BNSF strictly liable “for the manner

in which it conducted the transport of vermiculite,” which the Montana Supreme Court specifically foreclosed in *Eddy. Id.* at 874.

We therefore conclude that certification is unwarranted because there is sufficient Montana state law to answer the question presented. *See Syngenta Seeds, Inc. v. Cnty. of Kauai*, 842 F.3d 669, 681 (9th Cir. 2016). These claims have been pending since 2021 and involve alleged exposure to asbestos dating back to 1954. *See Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1009 (9th Cir. 2009) (“[W]e do not find it necessary to further prolong these proceedings [by certifying questions to the Montana Supreme Court] where the state law is clear.”).

REVERSED and REMANDED with instructions.

CALLAHAN, J., concurring:

I join the opinion in full because it correctly concludes that under Montana law the common carrier exception protects BNSF from Plaintiffs’ strict liability claims. I write separately to stress that, in my view, the Interstate Commerce Commission Termination Act separately preempts Plaintiffs’ strict liability claims.

I

A

To substantially reform excessive economic regulation of the Nation’s transportation industries, Congress adopted the Interstate Commerce Commission Termination Act of 1995 (ICCTA). Pub. L. 104-88, 109

Stat. 803. ICCTA grants the Surface Transportation Board jurisdiction over specific modes and locations of “transportation by rail carrier.” 49 U.S.C. § 10501(a). For that transportation and certain related activities, the Board has exclusive jurisdiction. *Id.* § 10501(b). ICCTA also provides a comprehensive remedial scheme for enforcing regulations of rail transportation, holding rail carriers liable, and providing remedies to persons injured by rail carriers. *Id.* §§ 11701-11707. Remedies provided by ICCTA “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.* § 10501(b).

We first interpreted ICCTA’s preemptive scope in *City of Auburn v. United States*, observing that “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting *CSX Transp., Inc. v. Ga Pub. Serv. Comm’n*, 944 F. Supp. 1573 (N.D. Ga. 1996)). There, we held that ICCTA preempts not only nominal “economic” regulations but also other regulations that “will in fact amount to ‘economic regulation.’” *Id.* at 1031; *see also Or. Coast Scenic R.R., v. Or. Dep’t of State Lands*, 841 F.3d 1069, 1076-77 (9th Cir. 2016). We have also held that ICCTA preemption applies both to laws targeting railroad operations, *City of Auburn*, 154 F.3d at 1031, and to laws of general applicability that would have the “effect of managing or governing rail transportation,” *Ass’n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).

B

Montana, like many states, has adopted Sections 519, 520, and 521 of the Restatement (Second) of Torts. *See* Majority Op. at 10-11. Section 519 provides for strict liability for abnormally dangerous activities; Section 520 lays out a multifactor test for courts to use to determine whether an activity should be deemed abnormally dangerous; and Section 521 grants an exception to strict liability for abnormally dangerous activities undertaken by common carriers pursuant to a public duty. *Id.*

In 2020, decades after BNSF stopped transporting vermiculite for W.R. Grace & Company, the Montana Supreme Court applied Section 520 to hold that BNSF's past "handling of asbestos under the facts presented here constitutes an abnormally dangerous activity for which BNSF is strictly liable." *BNSF Ry. Co. v. Eddy*, 459 P. 3d 857, 873 (Mont. 2020). The Montana Supreme Court ruled that BNSF, as a common carrier, is protected by Section 521 from "strict liability imposed as a result of its transporting vermiculite," but further stated that BNSF could face strict liability for its asbestos-handling "activities *other* than transportation of vermiculite." *Id.* at 874-75 (emphasis added). The court further noted that "BNSF may still be found liable under a theory of ordinary negligence for the manner in which it conducted the transport of vermiculite ore." *Id.* at 874.

In 2021, Plaintiff estates sued BNSF in federal district court for personal injuries, resulting in death, caused by BNSF's handling of vermiculite. Majority Op. at 7. Plaintiffs' suit asserted state law causes of action for both negligence and strict liability. *Id.* Plaintiffs premised these claims on the central propo-

sition that BNSF failed to prevent toxic vermiculite residuals from “collecting upon and escaping from” its Libby, Montana railyard.

In 2024, a jury found for BNSF on Plaintiffs’ negligence claims but found BNSF liable on Plaintiffs’ strict liability claims. *Id.* at 8-9. In obtaining their favorable jury verdict on the strict liability claims, Plaintiffs relied on a fine-grained distinction between BNSF’s “transportation of vermiculite” and its “other activities” dealing with vermiculite. The district court accepted this distinction, rejecting both BNSF’s common carrier exception argument and ICCTA preemption argument in BNSF’s renewed motion for judgment as a matter of law. BNSF also asserted—and the district court also rejected—an argument that the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. § 5101 *et seq.*, separately preempts Plaintiffs’ strict liability claims.¹ BNSF timely appealed.² Majority Op. at 9.

II

We review *de novo* the district court’s legal conclusion about the scope of ICCTA preemption. *Or. Coast*

¹ HMTA is the Nation’s primary law regulating the transportation of hazardous materials and seeks “to protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce.” 49 U.S.C. § 5101.

² Plaintiffs have not appealed the jury’s adverse finding on their negligence claims. I therefore do not reach the question of whether ICCTA would preempt Plaintiffs’ attempt to recover damages from BNSF based on negligence. I also do not address BNSF’s alternative argument that HMTA preempts Plaintiffs’ strict liability claims.

Scenic R.R., 841 F.3d at 1072 (citing *In re Korean Air Lines Co.*, 642 F.3d 685, 691 n.3 (9th Cir. 2011)).

III

To determine whether ICCTA preempts Plaintiffs' strict liability claims, we first consider whether "the activity in question" comes "within the statutory grant of jurisdiction to the Surface Transportation Board." *Id.*; see 49 U.S.C. § 10501(a). If the Board possesses jurisdiction, then we next assess whether its jurisdiction is exclusive. *Or. Coast Scenic R.R.*, 841 F.3d at 1073; see 49 U.S.C. § 10501(b). An affirmative answer to both inquiries follows from the reasoning supporting our unanimous opinion today regarding the common carrier exception.

BNSF's handling of vermiculite falls within ICCTA's grant of jurisdiction to the Surface Transportation Board. ICCTA grants jurisdiction to the Board over particular modes and locations of "transportation by rail carrier." 49 U.S.C. § 10501(a). This case concerns only whether BNSF's handling of vermiculite counts as "transportation by rail carrier," as defined by 49 U.S.C. § 10501(a). Our opinion makes clear that it does. See Majority Op. at 11-17. In applying the Montana Supreme Court's precedential holding that the common carrier exception protects BNSF from "strict liability imposed as a result of its transporting vermiculite," *Eddy*, 459 P. 3d at 874, we utilized ICCTA's definition of "transportation." Majority Op. at 13 (citing 49 U.S.C. § 10102(9)). Using ICCTA's definition, we determined that BNSF's handling of vermiculite qualifies as "transportation," and thus the common carrier exception protects BNSF from Plaintiffs' strict liability

claims. *Id.* That conclusion also answers the first question of the ICCTA preemption analysis.

Further, the Board's jurisdiction over BNSF's transportation of vermiculite is exclusive. 49 U.S.C. § 10501(b) makes the Board's jurisdiction exclusive over "transportation by rail carriers." That Section also expressly states that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt remedies provided under Federal or State law." *Id.* Thus, because our opinion makes clear that BNSF's handling of vermiculite falls within ICCTA's definition of "transportation," the Board has exclusive jurisdiction and Section 10501(b) facially preempts Plaintiffs' attempt to recover on a Montana strict liability cause of action. *See* Majority Op. at 11-17.

But the preemption analysis does not end there. Montana's strict liability law is a common law tort claim of general applicability, and we have held that "ICCTA does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce." *Ass'n of Am. R.R.s*, 622 F.3d at 1097. So this case requires determining whether the application of Montana's strict liability law to BNSF's transportation of vermiculite "may reasonably be said to have the effect of managing or governing rail transportation," or instead has only "a more remote or incidental effect on rail transportation." *Id.* at 1097-98 (internal quotation marks omitted).

Here, applying Montana's strict liability law to BNSF's transportation of vermiculite would have the effect of managing or governing rail transportation;

ICCTA preemption therefore applies. Several related reasons support this conclusion.

First, allowing strict liability for BNSF's transportation of vermiculite would impose severe compliance costs. Recall that in this case, Plaintiffs seek to hold BNSF strictly liable for all injuries resulting from BNSF's failure to use equipment and practices that would have prevented the release of vermiculite residuals from its railyard. To ensure future compliance with this sky-high standard of care, BNSF would have to adopt a variety of new equipment and practices—including possibly redesigning its railcars, altering switching operations in its railyard, purchasing new equipment, and implementing new training and operating procedures. Adopting these measures would impose a serious financial burden. And BNSF would have to implement these onerous compliance measures despite the fact that under HMTA, vermiculite does not qualify as a hazardous material warranting federal regulation of its transportation by rail carriers—even when the vermiculite contains toxic asbestos. *See* 49 U.S.C. § 5101 *et seq.*; 49 C.F.R. § 172.102(c)(1)(156) (stating that “[a]sbestos that is immersed or fixed in a . . . mineral ore . . . is not subject” to HMTA regulatory requirements). Plaintiffs' strict liability claims, regardless of whether separately preempted by HMTA, function as regulations akin to those issued under HMTA authority.

Second, permitting strict liability here would allow for unpredictable and unfair penalties for noncompliance. Under a strict liability regime, the remedy provided by Montana law for any harmful release of vermiculite residuals is damages, as awarded by a jury. And as the Supreme Court has recognized, “state regu-

lation can be . . . effectively exerted through an award of damages, and the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.” *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (citation modified). In this case, Plaintiffs’ damage awards totaled to eight million dollars, not including additional taxable costs or interest. This suggests the magnitude of BSNF’s potential exposure in the many other pending claims against it. *See* Majority Op. at 9. These damage awards resemble financial penalties for noncompliance similar to (1) remedies provided by ICCTA for regulatory violations and for persons injured by rail carriers, *see* 49 U.S.C. §§ 11701-11704, and (2) fees and penalties assessed for noncompliance with HMTA regulations, *see id.* §§ 5122-5124.

Third, applying strict liability here can be expected to increase rates that BNSF and other rail carriers charge customers. Based on the facts of this case, liability would show rail carriers that they can face future liability for transporting materials that are not considered to be hazardous at the time of transport. So carriers may reasonably seek to hike rates to account for the costs and penalties associated with a strict liability standard for transporting not only vermiculite but also an unforeseen range of other materials.

In sum, the application of strict liability to BNSF’s transportation of vermiculite would have tremendous economic consequences, effectively governing BNSF’s railroad operations and unreasonably interfering with interstate commerce. In this regard, Montana’s generally applicable strict liability law appears similar to state and local regulations that we have previously held to be preempted by ICCTA. *See City of Auburn*,

154 F.3d at 1027-31 (invalidating county review of the environmental impact of proposed operations on railway line); *Ass'n of Am. R.R.s*, 622 F.3d at 1095-98 (nullifying local rules “aimed at limiting the air pollution created by idling trains”); *Or. Coast Scenic R.R.*, 841 F.3d at 1076-77 (enjoining application of Oregon’s “remove-fill law,’ which, among other things, require[d] a state permit for the removal of any amount of material from” designated waters).

* * *

Today we correctly hold that BNSF is entitled to the common carrier exception to strict liability for its transportation of vermiculite. Majority Op. at 11-17. I would further hold that ICCTA preempts Plaintiffs’ attempt to recover damages from BNSF, based on strict liability under Montana law, for injuries resulting from BNSF’s transportation of vermiculite.

**ORDER, U.S. DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION
(JULY 15, 2024)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JACKSON WELLS, as Personal Representative for
the Estate of THOMAS E. WELLS, deceased; and
JUDITH HEMPHILL, as Personal Representative
for the Estate of JOYCE H. WALDER, deceased,

Plaintiffs,

v.

BNSF RAILWAY COMPANY,

Defendant.

No. CV-21-97-GF-BMM

Before: Brian M. MORRIS, Chief District Judge,
U.S. District Court.

ORDER

The Clerk of Court is HEREBY ORDERED to
enter Judgment in accordance with the Jury's verdicts
(Doc. 390); (Doc. 392), dated April 22, 2024, as follows:

1. The Clerk of Court shall enter Judgment
against BNSF and in favor of Plaintiffs on

Plaintiffs' strict liability claims. The Clerk shall indicate the jury's award of compensatory damages as being \$8,000,000.00, or \$4,000,000.00 per Plaintiff. The Judgement shall additionally include taxable costs, totaling \$53,651.10. The Judgment shall indicate that jury's award includes post-judgement interest from the date of that judgment is entered until the date the judgment is paid at a rate of 5.00%, compounded annually.

2. The Clerk of Court shall enter Judgement against Plaintiffs and in favor of BNSF on Plaintiffs' negligence claims.
3. The Clerk of Court shall enter Judgment against Plaintiffs and in favor of BNSF on Plaintiffs' punitive damages claims.
4. The Clerk of Court is then directed to close this case.

DATED this 15th Day of July 2024.

/s/ Brian M. Morris
Chief District Judge
U.S. District Court

**ORDER, U.S. DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION
(JULY 11, 2024)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JACKSON WELLS, as Personal Representative for
the Estate of THOMAS E. WELLS, deceased; and
JUDITH HEMPHILL, as Personal Representative
for the Estate of JOYCE H. WALDER, deceased,

Plaintiffs,

v.

BNSF RAILWAY COMPANY,

Defendant.

No. CV-21-97-GF-BMM

Before: Brian M. MORRIS, U.S. District Court,
Chief District Judge.

ORDER

INTRODUCTION

Plaintiffs Jackson Wells, as Personal Represent-
ative for the Estate of Thomas E. Wells, deceased, and
Judith Hemphill, as Personal Representative for the

Estate of Joyce H. Walder, deceased, (collectively “Plaintiffs”) filed a motion to enter judgment on May 16, 2024. (Doc. 406.) Defendant Burlington Northern Santa Fe Railway Company (“BNSF”) opposes Plaintiffs’ motion. (Doc. 414.)

BNSF filed a motion for judgment notwithstanding the verdict as to Plaintiffs’ strict liability claims on May 20, 2024. (Doc. 408.) Plaintiffs oppose BNSF’s motion. (Doc. 419.) The Court conducted a motion hearing on June 26, 2024. (Doc. 425.) The Court will consider BNSF’s motion for judgment notwithstanding the verdict. (Doc. 408.) The Court examines Plaintiffs’ motion to enter judgment (Doc. 406), Plaintiffs’ application of costs (Doc. 404), BNSF’s objection to Plaintiffs’ application of costs (Doc. 405), and BNSF’s motion to strike response (Doc. 413) in a future order.

FACTUAL AND LEGAL BACKGROUND

The facts remain well-known to the Court and to the parties and will not be repeated in full here. This action concerns BNSF’s handling and transport of vermiculite containing asbestos in Libby, Montana. The Court conducted a jury trial in this matter from April 8, 2024, to April 22, 2024. The jury determined that BNSF’s handling of vermiculite containing asbestos outside its duties as a common carrier served as a substantial factor in bringing about the injuries to Plaintiffs Wells and Walder. (Doc. 390); (Doc. 392.) The jury determined, however, that BNSF did not act negligently with respect to Plaintiffs Wells and Walder. The jury declined also to find that BNSF had acted maliciously with respect to Plaintiffs Wells and Walder. The jury awarded Plaintiffs Wells and

Walder \$4,000,000 each in compensatory damages, for a total of \$8,000,000.

LEGAL STANDARD

Fed R. Civ. P. 50(b) permits a party to file a renewed motion for judgment as a matter of law and include an alternative or joint request for a new trial under Fed. R. Civ. P. 59. “To move for judgement as a matter of law after a verdict, the movant must have moved for judgment as a matter of law pre-verdict.” *Andrews v. Dejoy*, No. CV-20-11-GF-BMM, 2022 WL 109939, at *1 (D. Mont. Jan. 5, 2022), *aff’d sub nom. Andrews v. Brennan*, No. 22-35081, 2023 WL 4637114 (9th Cir. July 20, 2023). The grounds for the renewed motion for a judgment as a matter of law are “limited to the grounds asserted in the pre-deliberation Rule 50(a) motion.” *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009). A party may not “raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion.” *Id.* (citing *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)).

Judgment as a matter of law is “proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury’s verdict.” *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002); *Kay v. Cessna Aircraft Co.*, 548 F.2d 1370, 1372 (9th Cir. 1977). “The verdict will be upheld if it is supported by substantial evidence, ‘even if it is also possible to draw a contrary conclusion.’” *First Nat’l Mortg. Co. v. Fed. Realty Inv. Tr.*, 631 F.3d 1058, 1067 (9th Cir. 2011) (quoting *Pavao*, 307 F.3d at 918)).

The standard that a party must meet to overturn a jury's verdict proves very high. *Costa v. Desert Palace*, 299 F.3d 838, 859 (9th Cir. 2002). The Court may not substitute its "view of the evidence for that of the jury" and the Court may not "make credibility determinations." *Id.* (internal quotations omitted). "[T]he court must draw all reasonable evidentiary inferences in favor of the non-moving party." *Id.*; *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999).

DISCUSSION

I. BNSF's motion to alter judgment.

BNSF asserts four grounds in its motion to alter the judgement: 1) Plaintiffs' strict liability claim is preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), the Hazardous Materials Transportation Act ("HMTA"), and the Federal Railroad Safety Act ("FRSA"); 2) the Court erred in applying collateral estoppel to determine that BNSF's handling of asbestos in Libby, Montana amounted to an abnormally dangerous activity; 3) the common carrier exception bars Plaintiffs' strict liability claims; and 4) Plaintiffs failed to present sufficient evidence to support their strict liability claims. (Doc. 409 at 13-31.) The Court will discuss separately each of these grounds.

1. Federal Preemption

A. ICCTA

BNSF asserts that the ICCTA preempts Plaintiffs' strict liability claims. (Doc. 409 at 13.) The Court disagrees. The Court denied previously BNSF's motion

for a directed verdict concerning Plaintiffs' strict liability claims, writing in pertinent part:

Plaintiffs have offered evidence sufficient to survive a motion for judgment as a matter of law that Defendant carried on the abnormally dangerous activity of maintaining a railyard or other BNSF property in such a manner that accumulated asbestos could spread as airborne particulates into the nearby community. *Compare Eddy* at 873 ("BNSF's handling of asbestos under the facts presented here constitutes an abnormally dangerous activity for which BNSF is strictly liable under Restatement (Second) of Torts, § 519"). Plaintiffs have presented evidence that non-party W.R. Grace loaded BNSF cars and provided asbestos-containing vermiculite that BNSF subsequently moved onto, around, and through BNSF property. Plaintiffs have proffered evidence that vermiculite-containing BNSF railcars transited and stopped at BNSF properties in Libby in various states of disorder and disrepair, such that vermiculite particulates left the exteriors and interiors of railcars to alight on BNSF property.

Plaintiffs have presented evidence that once the asbestos-containing material landed on BNSF property, BNSF failed to adequately clean or quarantine the material, instead allowing it to disperse in the air in and around the premises. Nothing under BNSF's duty as a common carrier prevented Defendant from periodically cleaning the railyard, or from improving its facilities to capture

vermiculite dust for safe disposal. Defendant carried on an “abnormally dangerous activity,” that is, maintaining uncontained asbestos-containing material [with access to] open air on its property, caused Plaintiffs harm— asbestos-exposure-related disease—of the type that made the activity abnormally dangerous.

(Doc. 373 at 4-5.) The Court additionally viewed as persuasive the district court’s determination in *In re E. Palestine Train Derailment*, No. 4:23CV0242, 2024 U.S. Dist. LEXIS 43837, at *49-50 (N.D. Ohio Mar. 13, 2024), that strict liability was not prohibited where “[Norfolk Southern] voluntarily undertook activities for their own purpose; namely, to release and burn vinyl chloride in order to get the derailed cars out of the way to start their trains running through East Palestine [Ohio] again to earn revenue.” (citations omitted.)

The ICCTA provides the Surface Transportation Board (“STB”) exclusive jurisdiction over the: (1) “transportation by rail carriers, and the remedies provided in this part with respect to . . . services, and facilities of such carriers”; and (2) “construction, acquisition, [and] operation . . . of facilities.” 49 U.S.C. § 10501(b). The ICCTA expressly preempts state law remedies that relate to the “regulation of rail transportation”:

Except as otherwise provided in this part, the remedies provided under this part with respect to *regulation of rail transportation* are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (emphasis added). The ICCTA defines “transportation” to encompass physical

instrumentalities that are “related to the movement of passengers or property,” such as a “yard, property, facility, instrumentality, or equipment” as well as “services related to that movement, including . . . storage, handling, and interchange of passengers or property[.]” 49 U.S.C. § 10102(9).

The Ninth Circuit has determined that the “ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation.” *Ass’n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010). “Where a tort claim would interfere with ‘rail transportation’ or ‘operation’ of railroad tracks or facilities, the regulation or claim is expressly preempted.” *Benson v. Union Pacific R. Co.*, 2008 WL 2946331, at *3 (E.D. Cal. 2008) (quoting *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998)). The ICCTA also preempts state common law duties that impact how a railroad operates their lines. *Staley v. BNSF Ry. Co.*, No. CV 14-136-BLG-SPW, 2015 WL 860802, at *6 (D. Mont. Feb. 27, 2015) (quoting *Friberg v. Kansas City S. Ry Co.*, 267 F.3d at 439, 444 (5th Cir. 2001.)) “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *City of Auburn*, 154 F.3d at 1030 (citation omitted).

The ICCTA does not, however, “preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce.” *BNSF Ry. Co. v. California Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018) (citation omitted). The ICCTA “preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the

continued application of laws having a more remote or incidental effect on rail transportation. What matters is the degree to which the challenged regulation burdens rail transportation[.]” *Id.* at 760–61 (quoting *Am. Railroads*, 622 F.3d at 1097-98). The Eleventh Circuit in *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001), recognized that “Congress narrowly tailored the ICCTA preemption provision to displace only ‘regulation,’ *i.e.*, those state laws that may reasonably be said to have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail transportation, . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” (alterations in original).

Though not binding, the Court views the Fifth Circuit’s determination in *Guild v. Kansas City Southern Ry. Co.*, 541 Fed. Appx. 362 (5th Cir. 2013), as persuasive. The Fifth Circuit in *Guild* determined that the plaintiffs’ negligence claim stemming from Kansas City Southern Railway Company (“KCSRC”) alleged damaging of the plaintiffs’ spur track by parking rail cars with excessive weight was not expressly or implicitly preempted by the ICCTA. *Id.* at 367-68. The Fifth Circuit wrote in pertinent part: “[r]ather, the effects of state negligence law on rail operations are merely incidental.” *Id.* at 367 The Fifth Circuit further noted that plaintiffs’ negligence claim, as pleaded, would not “have the effect of *unreasonably* burdening or interfering with KCSRC’s operations.” *Id.* at 368 (emphasis original) (citation omitted.)

The Court views as similarly persuasive the Tenth Circuit’s determination in *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007). *Emerson* considered whether the ICCTA preempted

plaintiff's state law tort claims arising from KCSRC's discarding of used rails and railroad ties, in addition to KCSRC failing to maintain the condition of a drainage ditch, thereby resulting in flooding on the plaintiff's property. *Id.* at 1128. The Tenth Circuit determined that the ICCTA did not expressly preempt the plaintiffs' state law claims. *Id.* at 1132. The Tenth Circuit wrote in pertinent part, "[w]e do not think that the plain language of [the ICCTA] can be read to include the conduct the landowners complaining of here – discarding old railroad ties into a wastewater drainage ditch adjacent to the track and otherwise failing to maintain the ditch. . . . Rather, [these acts] are possibly tortious acts committed by a landowner who happened to be a railroad company." *Id.* at 1129-30.

The Tenth Circuit further concluded that "a factual assessment must be made as to whether requiring [KCSRC] to remedy the injury claimed by the Landowners would have the effect of preventing or unreasonably interfering with railroad transportation." *Id.* at 1133. The Court recognizes that the Tenth Circuit remanded *Emerson* back to the Eastern District of Oklahoma, and, following a jury trial, judgment was entered for the railroad defendant. *See Revocable Tr. of Davis v. Kansas City S. Ry. Co.*, No. CIV-05-331-KEW, 2009 WL 3150409, at *1 (E.D. Okla. Sept. 30, 2009).

The Court determines that the ICCTA does not bar Plaintiffs' strict liability claims. Plaintiffs' strict liability claims concern the presence and accumulation of asbestos and asbestos-contaminated vermiculite at the Libby Railyard. Plaintiffs' strict liability claims, that alleged that BNSF engaged in an abnormally dangerous activity through its handling of asbestos in

Libby, Montana, represent a law of general applicability that does not unreasonably interfere with interstate commerce. *See BNSF Ry. Co.*, 904 F.3d at 760. Strict liability for carrying out an abnormally dangerous activity remains a state law claim, as noted by the Montana Supreme Court in *BNSF Ry. Co. v. Eddy*, 459 P.3d 857 (Mont. 2020).

The Court recognizes that the definition of “transportation” for purposes of the ICCTA remains broad. *See* 49 U.S.C. § 10102(9). The Court determines, however, that the accumulation and presence of asbestos and asbestos-contaminated vermiculite in the Libby Railyard does not amount to a physical instrumentality related to the movement of passengers or property. *See id.* The Court recognizes that the Libby Railyard itself may indeed be a physical instrumentality related to the movement of passengers or property, and, therefore, the Libby Railyard itself likely falls within the purview of the ICCTA. The Court determines, however, that the accumulation of presence of asbestos-contaminated vermiculite proves separable from the remainder of the Libby Railyard because the asbestos-contaminated vermiculite is not itself property, equipment, or an instrumentality related to the movement of passengers or property. *Cf. id.* The Court further acknowledges the transient nature of asbestos-contaminated vermiculite, which maintains the ability to enter the air and travel a considerable distance when disturbed from the ground. The remainder of the Libby Railyard, including the tracks, ballast, buildings, and equipment, do not maintain the ability to be freely and easily dispersed from the Libby Railyard and into the Libby, Montana community. The asbestos and asbestos-contaminated vermiculite

do not serve as a permanent or semi-permanent fixture of the Libby Railyard.

The asbestos and asbestos-contaminated vermiculite prove comparable to the drainage ditch at issue in *Emerson*, 503 F.3d at 1132. The Tenth Circuit determined that “discarding old railroad ties into a wastewater drainage ditch adjacent to the track and otherwise failing to maintain the ditch” does not amount to “transportation” within the meaning of the ICCTA. *Id.* The asbestos and asbestos-contaminated vermiculite here and wastewater and discarded railroad ties in *Emerson*, 503 F.3d at 1132, pose danger to persons and property existing outside the direct physical instrumentalities related to the movement of passengers and property.

The Court similarly determines that the ICCTA’s exclusive jurisdiction over the construction, acquisition, and operation of facilities does not expressly preempt Plaintiffs’ strict liability claims. The ICCTA provides in pertinent part the following: “[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C.A. § 10501(b). Plaintiffs’ strict liability claims admittedly involve the Libby Railyard, which likely would be classified as a railroad facility within the meaning of the ICCTA, but such claims do not amount to a remedy concerning the regulation of rail transportation. *See Florida East Coast Ry Co.*, 266 F.3d at 1331 (“Congress narrowly tailored the ICCTA pre-emption provision to displace only “regulation,” i.e., those state laws that may reasonably be said to have the effect of “manag[ing]” or “govern[ing]” rail transportation, Black’s Law Diction-

ary 1286 (6th ed.1990), while permitting the continued application of laws having a more remote or incidental effect on rail transportation.”)

Plaintiffs’ strict liability claims concern the presence and accumulation of asbestos and asbestos-contaminated vermiculite in the Libby Railyard. Such claims do not seek to govern the operation of the Libby Railyard or the use of the Libby Railyard for rail transportation. The district court in *Suchon v. Wis. Cent., Ltd.*, No. 04-C-0379-C, 2005 U.S. Dist. LEXIS 4343, at *10 (W.D. Wis. Feb. 23, 2005), as a contrary example, determined that the ICCTA expressly preempted the plaintiff’s state law nuisance claim where the railroad defendant would be “restricted in the use of its property” because the plaintiff’s nuisance claim would not be “significantly different from allowing the state to impose restrictions on defendant through laws and regulations.”

The Ninth Circuit determined in *City of Auburn*, 154 F.3d at 1031, that the imposition of environmental permitting regulations on a railroad company by the plaintiff municipality was preempted by the ICCTA because such regulations amount to “‘economic regulation’ if the [railroad] carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.” Plaintiffs’ strict liability claims, by contrast, do not seek to impose zoning requirements or regulate the land or environmental use of the Libby Railyard. Plaintiffs’ strict liability claims instead seek to remedy the hazard posed by BNSF’s abnormally dangerous activity of handling asbestos and asbestos-contaminated vermiculite in Libby, Montana, including at the Libby Railyard. This remedy’s effect on rail transportation, including the operation of facilities,

appears negligible. The Court declines to interpret the ICCTA's preemptive effect so broadly as to encompass any potentially tortious conduct by a landowner who happens to be a railroad company, even if such conduct may have occurred on or around a facility within the meaning of the ICCTA. *See Emerson*, 503 F.3d at 1129-30. The Court concludes that the ICCTA does not expressly preempt Plaintiffs' strict liability claims.

The Court further determines that the ICCTA does not implicitly preempt Plaintiffs' strict liability claims. Plaintiffs' strict liability claims, stemming from the presence of vermiculite-contaminated asbestos in the Libby Railway, do not have the effect of unreasonably burdening or interfering with BNSF's railroading operations. The presence of, or lack thereof, asbestos and asbestos-contaminated vermiculite in the Libby Railway does not impact, interfere with, or otherwise effect BNSF's ability to conduct railroad operations from the Libby Railway. The Libby Railway does not require asbestos-contaminated vermiculite to operate. Asbestos does not serve as an essential component of the goods being hauled by BNSF to or from the Libby Railway.

The asbestos and asbestos-contaminated vermiculite instead represent an incidental byproduct related to BNSF's transportation of vermiculite from Libby, Montana. To hold BNSF strictly liable for injuries caused by the presence and buildup of asbestos-contaminated vermiculite amounts to a tortious act committed by a landowner who happens to be a railroad company. *See Emerson*, 503 F.3d at 1129-30. To hold a landowner strictly liable for an abnormally dangerous activity conducted on their property remains a law of general

applicability. The Court fails to see how such a claim for relief unreasonably will interfere with interstate commerce. *See BNSF Ry. Co.*, 904 F.3d at 760. To permit Plaintiffs’ strict liability claims in this instance will not have the effect of managing or governing rail transportation, but instead will provide a claim for relief for tortious acts committed by a landowner who happens to be a railroad. *See id.* at 760-61.

The Court need not consider Plaintiffs’ argument that collateral estoppel bars BNSF’s ICCTA preemption argument. The Court recognizes, however, that BNSF failed to raise ICCTA preemption at any time during the pre-trial proceedings. (*See* Doc. 80 at 2) (“Plaintiffs’ negligence and strict liability tort claims under Montana common law are preempted, as a matter of law, by the Hazardous Materials Transportation Act and the Federal Railroad Safety Act.”); (Doc. 188 at 6-12). BNSF first raised ICCTA preemption during the course of trial in its motion for a directed verdict concerning Plaintiffs’ strict liability claims on April 15, 2024. (*See* Doc. 359 at 15) (“Plaintiffs’ strict liability claims for alleged asbestos emissions resulting from BNSF’s operations in its Libby railyard are preempted by the ICCTA.”)

B. HMTA and FRSA

BNSF asserts that the HMTA and FRSA similarly preempt Plaintiffs’ strict liability claims. (Doc. 409 at 13.) BNSF failed to raise preemption stemming from the HMTA and FRSA in its pre-verdict motion for judgment as a matter of law. (*See* Doc. 359 at 15-21.) A party is limited to the grounds raised in a pre-verdict Fed. R. Civ. P. 50(a) motion when renewing its motion for a judgment as a matter of law. *Go Daddy*

Software, 581 F.3d at 961. “This requirement exists in part because it gives the non-moving party an opportunity to correct any alleged deficiencies in evidence at a time when the non-moving party is still in a position to correct the problem.” *Siqueiros v. Gen. Motors LLC*, 676 F. Supp. 3d 776, 801 (N.D. Cal. 2023) (citing *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)). The Ninth Circuit strictly construes the requirement to initially raise grounds in a pre-verdict Fed. R. Civ. P. 50 motion. *See Freund*, 347 F.3d at 761; *see also Idaho Golf Partners, Inc. v. TimberStone Mgmt., LLC*, No. 1:14-CV-00233-BLW, 2017 WL 3531481, at *3 (D. Idaho Aug. 17, 2017). The Court declines to consider BNSF’s HMTA and FRSA arguments that were not raised in BNSF’s pre-verdict motion.

The Court additionally recognizes that the Court considered HMTA and FRSA preemption in an earlier pre-trial motion filed by BNSF. (*See* Doc. 210 at 33.) The Court wrote in pertinent part: “[r]egarding the HMTA, ‘since asbestos immersed in mineral ore—like the vermiculite in this case—is not a hazardous material, then the Hazardous Materials Transportation Act has no regulatory effect.’” (*Id.* at 40.) (citing *Murphy-Fauth v. BNSF Ry. Co.*, No. 4:17-cv-0079-BMMJTJ (D. Mont.) (Doc. 66.); *Underwood v. BNSF Ry. Co.*, No. 4:17-cv-0083-BMMJTJ (D. Mont.) (Doc. 61.); *Deason v. BNSF Ry. Co.*, No. 4:17-cv-0076-BMM-JTJ. (D. Mont.) (Doc. 72.)) The Court determined that “the HMTA does not expressly or impliedly preempt state law with respect to [plaintiffs’] state law claims.” (*Id.*) The Court determined additionally that “[r]egarding the FRSA, the Court again agrees that ‘Montana state laws are not inconsistent with the FRSA regulations

and are therefore not preempted by the FRSA.” (*Id.* at 41.)

2. Collateral Estoppel

BNSF contends that it is entitled to a new trial pursuant to Fed. R. Civ. P. 59 because the Court erred in holding that collateral estoppel from *Eddy*, 459 P.3d, applies to BNSF’s “handling of asbestos.” (Doc. 409 at 19.) Fed. R. Civ. P. 59(a) provides that “[t]he court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court”

BNSF’s contention proves unavailing. The Court determined previously that BNSF’s handling of asbestos in Libby, Montana constituted an abnormally dangerous activity as a matter of law. (Doc. 222 at 5-15.) BNSF’s argument appears to be an attempt to relitigate the Court’s prior determination. BNSF fails to present evidence to warrant such relitigation, and the Court declines to disturb its prior determination. The Court properly deemed BNSF to be collaterally estopped from arguing that its “handling of asbestos” in Libby, Montana does not constitute an abnormally dangerous activity for the following reasons: 1) the issue presented in this action and in *Eddy*, 459 P.3d at 873, prove to be the same; 2) the Asbestos Court’s order, and the Montana Supreme Court’s opinion, prove to be final judgments on the merits; 3) BNSF is the same party in both this action and in *Eddy*, 459 P.3d; and 4) BNSF was provided with a full and fair opportunity to adjudicate whether its handling of asbestos in Libby, Montana constituted an abnormally

dangerous activity for purposes of strict liability. (Doc. 222 at 5-15.)

3. Common carrier exception

BNSF asserts that the Plaintiffs' strict liability claims are barred by the common carrier exception to common law strict liability as described in the Restatement (Second) of Torts § 521. (Doc. 409 at 24-25.) The Court ruled previously as follows:

Plaintiffs have presented evidence that once the asbestos-containing material landed on BNSF property, BNSF failed to adequately clean or quarantine the material, instead allowing it to disperse in the air in and around the premises. Nothing under BNSF's duty as a common carrier prevented Defendant from periodically cleaning the railyard, or from improving its facilities to capture vermiculite dust for safe disposal. Defendant carried on an "abnormally dangerous activity," that is, maintaining uncontained asbestos-containing material open air on its property, caused Plaintiffs harm—asbestos-exposure-related disease—of the type that made the activity abnormally dangerous.

(Doc. 372 at 4-5.) The Court declines to disturb its prior conclusion, or the jury's verdict, based on BNSF's argument concerning the common carrier exception. *See First Nat'l Mortg. Co.*, 631 F.3d at 1067 (a jury's verdict "will be upheld if it supported by substantial evidence, even if it is also possible to draw a contrary conclusion.") (citation omitted.)

4. Sufficiency of Evidence

BNSF lastly asserts that Plaintiffs presented insufficient evidence in support of their strict liability claims. (Doc. 409 at 25-33.) BNSF specifically claims the following: 1) inaction cannot predicate strict liability *vis a vie* an abnormally dangerous activity; 2) BNSF's activities were carried on in pursuance of a public duty, and are, therefore, exempt from strict liability; and 3) the Libby Railyard was an integral part of BNSF's railroading operations and fall within the common carrier exception. (*Id.*) BNSF's arguments fail to disturb the jury's determination that BNSF stands strictly liable for injuries caused to the Plaintiffs.

A. Inactivity

With regard to inactivity, BNSF asserts that Plaintiffs' strict liability claims are based on inactivity, namely, the alleged failure to clean and remove asbestos from the Libby Railyard. (Doc. 409 at 25.) The Court recognizes that BNSF failed to raise this argument in its written motion for a judgment as a matter of law regarding Plaintiffs' strict liability claims. (*See* Doc. 358.); (Doc. 359.) The grounds for the renewed motion for a judgment as a matter of law are "limited to the grounds asserted in the pre-deliberation Rule 50(a) motion." *E.E.O.C.*, 581 F.3d at 961. The Court declines to consider BNSF's inactivity argument.

Even if the Court were to reach the merits of BNSF's inactivity argument, BNSF's assertion proves unsupported. It is true, admittedly, that counsel for BNSF briefly referenced the argument that inactivity may not be the basis for a strict liability claim during the course of trial. (*See* Doc. 422-1 at 3) ("Similarly, an

inaction in a railyard, if that's really what their theory is here, is not and cannot be an abnormally dangerous activity.") BNSF's inactivity argument, while referenced after the close of Plaintiffs' case in chief, was not made as an independent basis for granting BNSF's pre-verdict judgment as a matter of law motion concerning Plaintiffs' strict liability claims. BNSF referenced such argument when rebutting Plaintiffs' counsel's description of the basis for Plaintiffs' strict liability claim. The Court, in denying BNSF's pre-verdict judgment as a matter of law motion, wrote in pertinent part: "Defendant [BNSF] carried on an "abnormally dangerous activity," that is, maintaining uncontained asbestos-containing material open air on its property, caused Plaintiffs harm—asbestos-exposure-related disease—of the type that made the activity abnormally dangerous." (Doc. 373 at 5.)

BNSF's attempt to classify the maintenance of asbestos and asbestos-contaminated vermiculite in the Libby Railyard as inactivity proves unpersuasive. The asbestos and asbestos-contaminated vermiculite arrived at the Libby Railyard via BNSF's railroading operation at the Libby, Montana vermiculite mine. This condition did not naturally exist or occur without impetus or activity from BNSF. BNSF transported asbestos and asbestos-contaminated vermiculite from the Libby, Montana vermiculite mine to and through the Libby Railyard. Asbestos and asbestos-contaminated vermiculite entered the Libby Railyard via BNSF's transport and remained in the Libby Railyard subject to being disturbed and scattered into the air, blowing into the Libby, Montana town and community. The Court disagrees that BNSF's activities in maintaining the Libby Railyard in such a condition amount to

inactivity and denies BNSF's motion on inactivity grounds.

B. Common Carrier Exception

BNSF contends additionally that the common carrier exception applies to Plaintiffs' strict liability claims because its operation of the Libby Railyard proves "necessary and inseparable from its public duty as a common carrier." (Doc. 409 at 30.) The Court declines to adopt such an expansive interpretation. The Court previously recognized that "[t]he Montana Supreme Court adopted Restatement (Second) of Torts, § 521, which provides, 'the rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.' *Eddy*, 459 P.3d at 873." (Doc. 222 at 15.) The Court further noted, however, that the Montana Supreme Court in *Eddy*, 459 P.3d at 875, determined that "§ 521 does not apply to 'other activities' in which BNSF engages not pursuant to its statutory duties." (*Id.* at 15-16.)

The Court's previous order in this action discussed the common carrier exception in substantial detail: "[t]he alleged presence of "reservoirs" of asbestos and asbestos contaminated materials at the Libby railyard appears to stand a step removed from BNSF's role as a carrier of vermiculite." (*Id.* at 16-17.) The Court further wrote:

BNSF contends that the common carrier exception "reach[es] into leasing, construction, oversight, management, and operations of facilities at the industry location that intersects with the railroad transportation

line where the goods are collected for transportation.” (Doc. 70 at 16.) BNSF asserts that the Libby railyard was necessary and inseparable from its public duty as a common carrier. (*Id.* at 17); (Doc. 84 at 20.) BNSF’s proposed approach would render §§ 519-520 redundant. No room would remain to impose strict liability for an abnormally dangerous activity if a common carrier were involved in any way if § 521 were read to encompass all aspects of a carrier’s operations, including leasing, construction, management, and facility operations.

(*Id.* at 18.)

Plaintiffs presented evidence at trial that the Libby Railyard contained a dangerous concentration of asbestos and asbestos-contaminated vermiculite that maintained the ability to escape from the Libby Railyard and travel into the Libby, Montana community. Plaintiffs further presented evidence that the Plaintiffs’ deaths were caused by mesothelioma, and that the Plaintiffs’ lungs contained Libby amphibole asbestos fibers, an asbestos fiber unique to Libby, Montana. The jury, after hearing evidence of the Plaintiffs’ deaths, the presence of asbestos and asbestos-contaminated vermiculite, and the condition of the Libby Railyard, determined that BNSF stands strictly liable for Plaintiffs’ injuries. The jury’s conclusion proves reasonable, and the Court declines to disturb the jury’s conclusions. *See Pavao*, 307 F.3d at 918; *see also Kay*, 548 F.2d at 1372.

BNSF’s common carrier argument, similar to its argument presented in pretrial proceedings, likely would result in the common carrier exception rendering

redundant strict liability stemming from an abnormally dangerous activity when the defendant serves as a common carrier. (*See* Doc. 222 at 18.) The Court remains mindful that the Montana Supreme Court, in adopting the common carrier exception, likely intended the common carrier exception to be construed narrowly. *See Eddy*, 459 P.3d at 875 (“[t]hus, BNSF’s activities other than transportation of vermiculite are not protected by the common carrier exception.”) The Court declines to disturb the jury’s verdict based on this rationale.

II. BNSF’s motion for a new trial.

BNSF argues finally that it is entitled to a new trial because the Court erred in determining that collateral estoppel prevented BNSF from arguing that its handling of asbestos in Libby, Montana did not amount to an abnormally dangerous activity. (Doc. 409 at 19-21.) Fed. R. Civ. P. 59(a)(1)(A) permits a court to “grant a new trial . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court.” The Court is “bound by those grounds that have been historically recognized.” *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003). “Historically recognized grounds include, but are not limited to, claims ‘that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.’” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)).

The Ninth Circuit has determined that “[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based

upon false or perjurious evidence, or to prevent a miscarriage of justice.” *Id.* (quoting *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000)). In considering a motion for a new trial, the Court “is not required to view the trial evidence in the light most favorable to the verdict. Instead, the district court can weigh the evidence and assess the credibility of the witnesses.” *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 842 (9th Cir. 2014).

The Court determines that BNSF was properly collaterally estopped from arguing that its handling of asbestos in Libby, Montana did not amount to an abnormally dangerous activity, based on the analysis presented above. The Court determination forecloses BNSF’s argument for a new trial based on alleged misapplication of collateral estoppel. The Court finds no evidence or argument supports the granting of a new trial, and denies BNSF’s motion.

ORDER

Accordingly, IT IS ORDERED:

1. BNSF’s motion for judgment notwithstanding the verdict as to Plaintiffs’ strict liability claims (Doc. 408) is DENIED.

DATED this 11th Day of July 2024.

/s/ Brian M. Morris
Chief District Judge
U.S. District Court

**SPECIAL VERDICT FOR PLAINTIFF WELLS
(APRIL 22, 2024)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JACKSON WELLS, as Personal Representative for
the Estate of THOMAS E. WELLS, deceased; and
JUDITH HEMPHILL, as Personal Representative
for the Estate of JOYCE H. WALDER, deceased,

Plaintiffs,

v.

BNSF RAILWAY COMPANY,

Defendant.

No. CV-21-97-GF-BMM

**SPECIAL VERDICT FORM
(PLAINTIFF WELLS)**

INSTRUCTIONS: You must unanimously agree with the answer to each question below. Answer the questions in this form in numerical order unless the form otherwise directs you to skip questions. Your presiding juror should sign and date the form at the bottom when you have reached a verdict. Please complete both verdict forms.

STEP 1

Question 1: Did Plaintiff Wells prove by a preponderance of the evidence that BNSF's handling of vermiculite containing asbestos outside its duties as a common carrier was a substantial factor in bringing about the injuries of Plaintiff Wells?

Answer: ☒ Yes

STEP 2

Question 2: Did BNSF fail to exercise reasonable care in its handling of asbestos and breach its duty of care to Plaintiff Wells?

Answer: ☒ No

Question 3: Did BNSF's failure to exercise reasonable care in its handling of asbestos constitute a substantial factor in bringing about the injuries of Plaintiff Wells?

Answer: ☒ No

STEP 3

*ONLY ANSWER THIS QUESTION IF YOU HAVE
ANSWERED "YES" TO QUESTION 1 OR
QUESTION 3.*

Question 4: What is the total dollar amount, if any, necessary to reasonably compensate Plaintiff Wells fully and fairly for his injuries and damages?

Answer: \$4,000,000.00.

STEP 4

Question 5: Do you find, by clear and convincing evidence, that BNSF had knowledge of facts or inten-

tionally disregarded facts that created a high probability of injury to Plaintiff Wells?

Answer: ☒ No

Question 6: Do you find, by clear and convincing evidence, that BNSF deliberately proceeded to act in conscious or intentional disregard of the high probability of injury to Plaintiff Wells?

Answer: ☒ No

Question 7: Do you find, by clear and convincing evidence, that BNSF deliberately proceeded to act with indifference to the high probability of injury to Plaintiff Wells?

Answer: ☒ No

Please sign this *Special Verdict Form* and return it to the Bailiff.

DATED this 22 day of April, 2024.

■ ■ ■ ■ ■ ■ ■ ■ ■ ■

Jury Foreperson

**SPECIAL VERDICT FOR PLAINTIFF WALDER
(APRIL 22, 2024)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JACKSON WELLS, as Personal Representative for
the Estate of THOMAS E. WELLS, deceased; and
JUDITH HEMPHILL, as Personal Representative
for the Estate of JOYCE H. WALDER, deceased,

Plaintiffs,

v.

BNSF RAILWAY COMPANY,

Defendant.

No. CV-21-97-GF-BMM

**SPECIAL VERDICT FORM
(PLAINTIFF WALDER)**

INSTRUCTIONS: You must unanimously agree with the answer to each question below. Answer the questions in this form in numerical order unless the form otherwise directs you to skip questions. Your presiding juror should sign and date the form at the bottom when you have reached a verdict. Please complete both verdict forms.

STEP 1

Question 1: Did Plaintiff Walder prove by a preponderance of the evidence that BNSF's handling of vermiculite containing asbestos outside its duties as a common carrier was a substantial factor in bringing about the injuries of Plaintiff Walder?

Answer: ☒ Yes

STEP 2

Question 2: Did BNSF fail to exercise reasonable care in its handling of asbestos and breach its duty of care to Plaintiff Walder?

Answer: ☒ No

Question 3: Did BNSF's failure to exercise reasonable care in its handling of asbestos constitute a substantial factor in bringing about the injuries of Plaintiff Walder?

Answer: ☒ No

STEP 3

*ONLY ANSWER THIS QUESTION IF YOU HAVE
ANSWERED "YES" TO QUESTION 1 OR
QUESTION 3.*

Question 4: What is the total dollar amount, if any, necessary to reasonably compensate Plaintiff Walder fully and fairly for her injuries and damages?

Answer: \$4,000,000.00

STEP 4

Question 5: Do you find, by clear and convincing evidence, that BNSF had knowledge of facts or inten-

tionally disregarded facts that created a high probability of injury to Plaintiff Walder?

Answer: ☒ No

Question 6: Do you find, by clear and convincing evidence, that BNSF deliberately proceeded to act in conscious or intentional disregard of the high probability of injury to Plaintiff Walder?

Answer: ☒ No

Question 7: Do you find, by clear and convincing evidence, that BNSF deliberately proceeded to act with indifference to the high probability of injury to Plaintiff Walder?

Answer: ☒ No

Please sign this *Special Verdict Form* and return it to the Bailiff.

DATED this 22 day of April, 2024.

■■■■■■■■■■■■■■■■■■■■

Jury Foreperson

**ORDER, U.S. DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION
(OCTOBER 16, 2023)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JACKSON WELLS, as Personal Representative for
the Estate of THOMAS E. WELLS, deceased; and
JUDITH HEMPHILL, as Personal Representative
for the Estate of JOYCE H. WALDER, deceased,

Plaintiffs,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation, ROBINSON INSULATION COMPANY,
a Montana Corporation for profit, GROGAN
ROBINSON LUMBER COMPANY,
a Montana corporation for profit, et al.,

Defendants.

No. CV-21-97-GF-BMM

Before: Brian M. MORRIS, U.S. District Court,
Chief District Judge.

ORDER

INTRODUCTION

Jackson Wells, as personal representative for the Estate of Thomas E. Wells, and Judith Hemphill, as personal representative for the estate of Joyce H. Walder (collectively “Plaintiffs”) filed a motion for summary judgment on February 2, 2023, concerning the limited scope of the common carrier defense to Burlington Northern Santa Fe Railway Company’s (“BNSF”) abnormally dangerous activity. (Doc. 57.) BNSF opposes this motion. (Doc. 70.) BNSF filed a motion for partial summary judgment on March 27, 2023. (Doc. 83.) Plaintiffs oppose this motion. (Doc. 170.)

The Court previously dismissed Plaintiffs’ claims against Robinson Insulation and Grogan Robinson Lumber. (Doc. 42.) BNSF is the only defendant remaining. (*See id.*) The Court granted Plaintiffs’ motion for summary judgment regarding BNSF’s nonparty affirmative defenses. (Doc. 210.) The Court denied BNSF’s motion for summary judgment regarding federal preemption. (*Id.*) Numerous evidentiary motions remain outstanding. (*See* Doc. 91); (Doc. 94); (Doc. 97); (Doc. 103); (Doc. 109); (Doc. 113); (Doc. 116); (Doc. 120); (Doc. 131); (Doc. 138); (Doc. 146); (Doc. 149.) The Court will address Plaintiffs’ motion for summary judgment concerning the limited scope of the common carrier defense to BNSF’s abnormally dangerous activity. (*See* Doc. 57.) The Court also will address BNSF’s motion for partial summary judgment. (*See* Doc. 83.) The Court will address the remaining motions by separate orders.

FACTUAL AND LEGAL BACKGROUND

Vermiculite ore containing high concentrations of amphibole asbestos was intensively mined, processed, and shipped from Libby, Montana between 1923 and 1994. (Doc. 15 at 4.) Vermiculite mining and transport operations resulted in the accumulation of significant asbestos contamination in and around Libby, including airborne asbestos contamination. (*Id.*) BNSF's railyard in downtown Libby served as the hub of the railroad company's vermiculite business. Plaintiffs allege BNSF transported crushed vermiculite ore, loaded into open rail cars from the vermiculite mine and along BNSF's "Libby Logger" line, to BNSF's railyard in downtown Libby. (Doc. 1 at 7-11.) Plaintiffs claim that BNSF transported between 193 million and four billion pounds of asbestos between 1925 and 1981, moving up to 105,000 pounds of asbestos per day into downtown Libby in the late 1960s and 1970s, and up to 126,000 pounds of asbestos per day through the 1980s. (Doc. 15 at 6.)

Plaintiffs allege that BNSF's activities caused Wells and Walder to be exposed to extraordinarily high levels of asbestos in or near Libby. (*See* Doc. 1.) Plaintiffs allege that their exposure resulted, in significant part, from BNSF's negligent operation of its Libby loading facility, its Libby railyard, and its transportation of asbestos-contaminated vermiculite between its loading facility and railyard. (*Id.* at 10-13.) Plaintiffs allege that a layer of asbestos-contaminated dust regularly coated the loading facility and the loaded rail cars. (*Id.*) Plaintiffs allege that BNSF's train cars released visible clouds of contaminated dust as they traveled from BNSF's loading facility to the Libby railyard. (Doc. 1 at 4-5.)

Plaintiffs claim that BNSF exposed Libby residents by failing to contain the dust or otherwise prevent it from blowing through Libby's downtown and surrounding neighborhoods. Plaintiffs allege that some of BNSF's activities in the Libby vermiculite industry extended beyond its role as a common carrier that simply transported required goods. Plaintiffs also claim that BNSF knew of the dangers of asbestos exposure by at least the 1940s, but failed to control the risk of the asbestos dust that regularly accumulated at the Libby railyard. (Doc. 15 at 9.)

Plaintiffs claim that Wells's asbestos exposures allegedly occurred while he lived adjacent to the Libby railyard. (Doc. 54 at 8.) Plaintiffs allege that Walder's exposures occurred when she lived in downtown Libby and regularly walked along BNSF's tracks and through the Libby railyard. (*Id.*)

LEGAL STANDARD

Summary judgment proves appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine material fact dispute requires sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The movant bears the initial burden of establishing the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*,

477 U.S. 317, 323 (1986). The summary judgment inquiry requires examining the evidence in the light most favorable to the nonmovant. Once the movant has met this initial burden, however, the party opposing the motion “may not rest upon the mere allegations or denials of [their] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Id.*

DISCUSSION

I. Plaintiffs’ motion for summary judgment concerning the limited scope of the common carrier defense to BNSF’s abnormally dangerous activity.

Plaintiffs’ motion for summary judgment concerning the limited scope of the common carrier defense to BNSF’s abnormally dangerous activity and BNSF’s motion for partial summary judgment are largely duplicative. (*See* Doc. 57); (Doc. 70); (Doc. 83); (Doc. 89); (Doc. 170); (Doc. 189.) The Court will discuss the motions together. The Court first will discuss whether collateral estoppel requires that the Court rule, as a matter of law, that BNSF’s activities concerning asbestos handling in Libby were abnormally dangerous. The Court then will address the applicability of the Restatement (Second) of Torts § 521’s common carrier exception to BNSF’s activities in Libby.

a. Whether collateral estoppel requires that the Court hold, as a matter of law, that BNSF’s handling of asbestos in Libby, Montana was abnormally dangerous.

Plaintiffs ask that the Court rule, as a matter of law, that BNSF’s handling of asbestos at the Libby

railyard resulted in an abnormally dangerous condition for which BNSF stands strictly liable. (Doc. 60 at 28.); (Doc. 170 at 13.) Plaintiffs allege that the doctrine of collateral estoppel, or issue preclusion, prevents BNSF from challenging whether its handling of asbestos constituted an abnormally dangerous activity. (Doc. 89 at 3-4.); (Doc. 170 at 4.)

State law determines whether a prior state court judgment should be entitled to collateral estoppel. *See Dodd v. Hood River County*, 136 F.3d 1219, 1225 (9th Cir. 1998). Collateral estoppel “bars the reopening of an issue that has been litigated and resolved in a prior suit.” *Victory Ins. Co. v. Downing*, 532 P.3d 850, 855 (Mont. 2023). Collateral estoppel requires that four elements be substantiated: 1) the issue decided in the prior adjudication must be identical to the issue raised in the action in question; 2) there must be a final judgment on the merits in the prior adjudication; 3) the party against whom preclusion is now asserted must be a party or in privity with a party to the prior adjudication; and 4) the party against whom preclusion is now asserted must have been afforded a full and fair opportunity to litigate the issue which may be barred. *McDaniel v. State*, 208 P.3d 817, 825 (Mont. 2009). The Court will consider separately each collateral estoppel element.

i. Issue identity

The Court compares the pleadings, evidence, and circumstances surrounding the two actions to determine whether the issue decided in a prior adjudication is identical to the issue raised in the present case. *Id.* at 826 (citations omitted). “[T]he bar that arises from collateral estoppel extends to all questions essential

to the judgment and actively determined by the prior valid judgment.” *Id.* (citing *Baltrusch v. Baltrusch*, 130 P.3d 1267, 1276 (Mont. 2006)). Collateral estoppel prevents relitigation of “determinative facts which were actually or necessarily decided in a prior action.” *Id.* The “identity of the issues is the most critical element . . . the fact that each action arises from the same transaction does not mean that each involve the same issues.” *Stanley L. & Carolyn M. Watkins Tr. v. Lacosta*, 92 P.3d 620, 626 (Mont. 2004).

BNSF argues that the Montana Supreme Court’s decision in *BNSF Ry. Co. v. Eddy*, 459 P.3d 857 (Mont. 2020), addressed different issues. (Doc. 70 at 4); (Doc. 84 at 4-5.) BNSF claims that the Asbestos Court did not explicitly state that BNSF’s activities in Libby, Montana were abnormally dangerous. (Doc. 70 at 4-5.); (Doc. 84 at 4.) BNSF asserts that neither the Asbestos Court, nor the Montana Supreme Court, determined whether BNSF’s alleged harboring of asbestos in the Libby railyard constituted an abnormally dangerous activity. (Doc. 70. at 6); (Doc. 84 at 5-6.) BNSF attempts to distinguish *Eddy* on the grounds that this case addresses whether BNSF engaged in an “abnormally dangerous activity when it allegedly ‘harbored’ an ‘open-air repository for asbestos’ in the Libby railyard.” (Doc. 189 at 4) (citations omitted.)

Eddy addressed legal issues identical to the issues raised in this case. *Eddy* addressed whether the Asbestos Court erred in concluding that BNSF’s handling of asbestos constituted an abnormally dangerous activity. 459 P.3d at 868. The Asbestos Court determined that BNSF had engaged in an abnormally dangerous activity. (See Doc. 58-12 at 12.) The Asbestos Court analyzed the six factors set out in Restatement

(Second) of Torts § 520: 1) existence of a high degree of risk of some harm to the person, land or chattels of others; 2) likelihood that the harm resulting from it will be caused; 3) inability to eliminate the risk by the exercise of care; 4) extent to which the activity is not a matter of common usage; 5) inappropriateness of the activity to the place where it is carried out; and 6) extent to which its value to the community is outweighed by its dangerous attributes. (*See id.* at 9.)

The Asbestos Court concluded that the existence of a high degree of risk, the likelihood that the harm that results will be great, the extent to which the activity is not a matter of common usage, the inappropriateness of the activity to the place where it was carried out, and the extent to which its value to the community is outweighed by its dangerous attributes all weighed in favor of finding that BNSF's activities in Libby were abnormally dangerous. (*Id.* at 12-13.) The Asbestos Court ruled that BNSF stands strictly liable "to these Plaintiffs for engaging in an abnormally dangerous activity vis-à-vis its operations in Libby, Montana." (*Id.* at 13.) The Montana Supreme Court affirmed the Asbestos Court's reasoning: "we conclude BNSF's handling of asbestos under the facts presented here constitutes an abnormally dangerous activity for which BNSF is strictly liable under Restatement (Second) of Torts, § 519." *Eddy*, 459 P.3d at 873.

Plaintiffs similarly raise the issue of whether BNSF's handling of asbestos in the Libby railyard constitutes an abnormally dangerous activity for purposes of strict liability. BNSF contends that this issue differs from the issue in *Eddy*. BNSF notes, however, that the Montana Supreme Court concluded that BNSF was entitled to the common carrier exception

to strict liability, pursuant to § 521, for its transportation of vermiculite. BNSF's argument places the cart before the horse. The Montana Supreme Court first determined in *Eddy* that BNSF's handling of asbestos constituted an abnormally dangerous activity for which BNSF is strictly liable. 459 P.3d at 873. The Montana Supreme Court determined that BNSF could be entitled to § 521's common carrier exception for its *transportation* of vermiculite only after having determined that BNSF's *handling* of asbestos constituted an abnormally dangerous activity. *Id.* at 874 (emphasis added).

BNSF's attempt to distinguish the Asbestos Court's holding falls short. (See Doc. 58-12.) The Libby railyard operated between 1923 and 1994, a fact common to the multitude of asbestos exposure cases originating in Libby, Montana. BNSF's operation of the Libby railyard as an open-air vermiculite loading and storage facility allegedly caused the asbestos exposure. (See Doc. 1 at 10-13.) Admittedly, the alleged asbestos exposure may have occurred in a variety of forms and through a variety of activities. This difference fails to change the fact that BNSF's asbestos handling and storage practices in and around the Libby railyard played a significant role in the alleged asbestos exposure. The nexus between BNSF and the harm caused, the continued presence of asbestos contaminated vermiculite at the Libby railyard, and the resulting asbestos exposure, remains the same in *Eddy* and here.

BNSF additionally seeks to distinguish the claims at issue from *Eddy* because "the current Plaintiffs allege from the outset of the lawsuit in their Complaint that BNSF 'harbored an abnormally dangerous

condition at its downtown Libby railyard by maintaining a reservoir of asbestos contaminated material . . . and failing to take measures to prevent toxic dust from collecting upon and escaping from its property.” (Doc. 67 at 6.) BNSF contends the Plaintiffs allege an issue not contemplated in *Eddy* and seek to cabin too narrowly the facts presented in *Eddy*. (*Id.*) BNSF’s argument misstates the Montana Supreme Court’s ruling.

The Montana Supreme Court determined that “BNSF’s handling of asbestos under the facts presented here constitutes an abnormally dangerous activity for which BNSF is strictly liable under Restatement (Second) of Torts, § 519.” *Eddy*, 459 P.3d at 873. The handling of asbestos in *Eddy* included “the transport of asbestos-containing vermiculite, the spillage of asbestos containing material along BNSF’s tracks and in its railyard, and the continued disruption of the built-up spilled asbestos by BNSF’s trains and workers.” *Id.* at 864. *Eddy* encompasses the facts here based on the direct nexus between the spillage of asbestos contaminated material by BNSF and the accumulation of such spilled material into “reservoirs” of asbestos contaminated material at the Libby railyard. (*See* Doc. 1 at 14.) The material in *Eddy*, the asbestos contaminated material, remains the same material alleged to be present here, and it arrived at the Libby railyard in the same manner. The facts differ only in the following ways: 1) the state of the asbestos laden vermiculite; 2) whether the vermiculite was being spilled onto the ground at the Libby railyard; and 3) whether the vermiculite had been spilled and was present and accumulated on the ground at and around

the Libby railyard. These facts present a difference without distinction.

The pleadings in *Eddy* raised identical issues. Plaintiffs Barnes, Braaten, and Flores, as representatives of the consolidated litigation before the Asbestos Court, alleged asbestos exposure stemming from the Libby railyard. (Doc. 90-7.) Plaintiff Barnes alleged exposure when riding his bike through piles of vermiculite in the downtown Libby railyard. (*Id.* at 3.) Barnes also alleged exposure when walking along the railroad tracks at the Libby railyard while bird hunting. (*Id.*) Plaintiff Braaten alleged exposure when playing along the railroad tracks in and around the downtown Libby railyard. (*Id.* at 4.) Plaintiff Flores alleged exposure from activities around the Libby railyard, including working at the Libby Care Center, attending baseball games, and using recreational facilities in the area surrounding the Libby railyard. (*Id.* at 5.)

Plaintiffs similarly allege asbestos exposure as a consequence of being in close proximity to the Libby railyard. (Doc. 1 at 3.) Plaintiff Wells alleges that exposure occurred when he lived approximately one-quarter mile from the railroad (*See* Doc. 59 at 4.) Plaintiff Wells alleges that further exposure occurred during the summer of 1978 when he lived in a trailer home abutting the Libby railyard. (*See id.*) Plaintiff Walder alleges that exposure occurred when, as a child, she would walk on the railroad tracks to get from her home to the ball field near the Libby railyard. (*See id.* at 9.) Plaintiff Walder further alleges that exposure occurred when she spent time near the Libby railyard while running track in middle and high school and frequenting the municipal baseball fields

to watch her brothers play baseball and to recreate. (*See id.* at 7.) Plaintiffs further allege that dust containing asbestos would drift through the Libby community and would be blown through Libby during periods of high winds. (*Id.* at 6.) The Libby railyard, and repeated close proximity thereto, presents a common issue raised in the pleadings in *Eddy* and the pleadings here.

ii. Final judgment

The Court will “look to see if [an issue] was actually litigated and adjudged as shown on the face of the judgment.” *McDaniel*, 208 P.3d at 825 (citations omitted). “It is widely recognized that the finality requirement is less stringent for issue preclusion than for claim preclusion.” *Baltrusch*, 130 P.3d at 1274 (citation omitted). In deciding whether to give preclusive effect to issues resolved in a judgment or order not yet entered as final, courts consider four factors: “1) whether the prior decision was adequately deliberated and firm and not avowedly tentative; 2) whether the parties were fully heard; 3) whether the court supported its decision with a reasoned opinion; and 4) whether the court’s prior decision was subject to appeal or was in fact reviewed on appeal.” *Id.* (citing Restatement (Second) of Judgments, § 12).

The Asbestos Court’s determination that BNSF had engaged in an abnormally dangerous activity in Libby, Montana, was adequately deliberated and not avowedly tentative. The 24-page ruling contains extensive factual background and procedural history discussion. (*See* Doc. 58-12.) The Asbestos Court considered the plaintiff’s claims in the third amended complaint and BNSF’s answer in which it raised 15

affirmative defenses. (*Id.* at 2.) The Asbestos Court individually analyzed the § 520 factors. (*See id.*) The Asbestos Court’s well-reasoned order considered the arguments advanced by both parties and relevant facts underlying those arguments. (*See id.*)

The parties were heard fully on the issue of whether BNSF’s activities were abnormally dangerous. The Asbestos Court conducted two hearings, one on December 11, 2018, and a second on January 7, 2019. (*See* Doc. 90-5); (Doc. 90-9.) The Montana Supreme Court reviewed the issue of whether BNSF’s handling of asbestos constituted an abnormally dangerous activity in *Eddy*. 459 P.3d. The Montana Supreme Court affirmed the Asbestos Court’s ruling and determined that “BNSF’s handling of asbestos under the facts presented here constitutes an abnormally dangerous activity for which BNSF is strictly liable under Restatement (Second) of Torts, § 519.” *Id.* at 873.

iii. Party or party in privity

The application of issue preclusion to a party that was not a party to the prior proceeding conflicts with the “deep-rooted historic tradition that everyone should have his own day in court.” *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (internal citations and quotations omitted). BNSF was a party in *Eddy*. 459 P.3d. This element of collateral estoppel has been met.

iv. Full and fair opportunity to adjudicate the claim

The burden rests on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate.

Baltrusch, 130 P.3d at 1274. BNSF fails to offer evidence that it was denied a full and fair opportunity to litigate the issue of whether its handling of asbestos was abnormally dangerous in *Eddy* and the underlying Asbestos Court case. *See* 459 P.3d. This element of collateral estoppel has been met.

Plaintiffs have met their burden in demonstrating that the issue of BNSF's handling of asbestos is identical to the issue raised in *Eddy*. 459 P.3d at 873. Plaintiffs have also met their burden in demonstrating that *Eddy* is to be given preclusive effect. Plaintiffs have further met their burden in demonstrating that BNSF was a party in *Eddy*. BNSF failed to meet its burden in demonstrating that it did not have a full and fair opportunity to litigate the issue of whether its handling of asbestos in Libby was abnormally dangerous. BNSF is collaterally estopped from arguing that its handling of asbestos in Libby was not abnormally dangerous.

b. Whether BNSF is limited in its use of § 521 to support its common carrier defense to strict liability.

Federal courts exercising diversity and alienage jurisdiction must apply the substantive law of the state in which they are located. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Montana Supreme Court adopted Restatement (Second) of Torts, § 521, which provides, "the rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier." *Eddy*, 459 P.3d at 873. The Montana Supreme Court determined that

§ 521 does not provide complete immunity, but rather serves as a shield against strict liability while still allowing plaintiffs to allege and pursue general negligence claims against defendants. *Id.* at 874 (citations omitted). The common carrier exception applies if “(1) the activity is carried on in pursuance of a public duty and (2) that public duty is imposed on the actor as a common carrier.” *Id.* at 874.

The Montana Supreme Court recognized in *Eddy* that BNSF serves as a common carrier of vermiculite, and, as such, § 521’s common carrier exception applies. *Id.* The Montana Supreme Court noted, however, that § 521 does not apply to “other activities” in which BNSF engages not pursuant to its statutory duties. *Id.* at 875. The Montana Supreme Court cited to *Murphy-Fauth v. BNSF Ry. Co.*, Case No. CV-17-79-GF-BMM-JTJ, 2018 WL 3601235, at *2 (D. Mont. July 27, 2018), in noting that the common carrier exception “does not apply when an entity engages in abnormally dangerous activity for ‘its own purposes.’” *Eddy*, 459 P.3d at 875.

The Asbestos Court has not yet determined which of BNSF’s activities in Libby, if any, fall into the category of “other activities” outside § 521. Relatively few cases address the application of § 521 to similar factual circumstances. BNSF cites to *Anderson v. BNSF Railway Co.*, 2010 Mont. Dist. LEXIS 73, as a point of comparison. The Montana state district court in *Anderson* denied summary judgment to the plaintiffs on their claim that strict liability applied to injuries arising from BNSF’s storage of diesel fuel on its property. *Id.* at *9. The Montana court concluded that BNSF’s storage of diesel fuel on its property “is an integral part of its operation as a common carrier, [and] is protected from strict liability.” *Id.*

Diesel fuel inherently implicates BNSF's duties as a common carrier, as diesel fuel powers the locomotives that BNSF uses in its role as a carrier. *Id.* at *4. The storage of asbestos contaminated materials, in contrast, does not appear inherently connected and essential to BNSF's role as a common carrier. The alleged presence of "reservoirs" of asbestos and asbestos contaminated materials at the Libby railyard appears to stand a step removed from BNSF's role as a carrier of vermiculite. Nothing appears to have directly required BNSF to store asbestos and asbestos contaminated materials at the Libby railyard to fulfill its role as a carrier of vermiculite.

BNSF cites to *Griffin v. Montana Rail Link*, 2000 ML 2438, *8 (D. Mont. 2000), as an example of § 521 being applied to the "transportation and storage" of hazardous materials. (Doc. 84 at 26.) *Griffin* addressed the leak of chlorine gas due to a train derailment. *Id.* at * 12. The hazardous material exposure occurred while Montana Rail Link directly operated as a common carrier. *Id.* The alleged presence of asbestos contaminated materials at the Libby railyard, in contrast, did not result directly from BNSF operating as a common carrier. The record remains unclear as to the scope of BNSF's storage of the materials at the Libby railyard and what circumstances dictated BNSF's storage of the materials. The Court anticipates resolution of those factual disputes through further development of the record.

The Court notes that federal law provides, in pertinent part, that "[a] rail carrier providing transportation or service . . . shall provide the transportation or service on reasonable request." 49 U.S.C. § 11101. As defined in federal law, "transportation" includes

“services related to [the movement of passengers or property or both by rail], including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” 49 U.S.C § 10102(9)(b). Montana law provides, in relevant part, that “[a] common carrier shall, if able to do so, accept and carry whatever is offered to the carrier, at a reasonable time and price, of a kind that the carrier undertakes or is accustomed to carry.” Mont. Code Ann. § 69-11-403 (Repealed April 19, 2023.)

BNSF contends that the common carrier exception “reach[es] into leasing, construction, oversight, management, and operations of facilities at the industry location that intersects with the railroad transportation line where the goods are collected for transportation.” (Doc. 70 at 16.) BNSF asserts that the Libby railyard was necessary and inseparable from its public duty as a common carrier. (*Id.* at 17); (Doc. 84 at 20.) BNSF’s proposed approach would render §§ 519-520 redundant. No room would remain to impose strict liability for an abnormally dangerous activity if a common carrier were involved in any way if § 521 were read to encompass all aspects of a carrier’s operations, including leasing, construction, management, and facility operations. Strong policy arguments admittedly caution against the imposition of strict liability in the context of common carriers.

The Court recognizes that common carriers are tasked with transportation upon reasonable request. *See* 49 U.S.C. § 11101; *Griffin*, 2000 ML 2438 at *11 (“[T]here is a clear public need to provide nation-wide transportation for commonly used materials regardless of the characteristics of such materials.”) (“[T]he

common carrier exception to strict liability for activities involving the transportation of hazardous materials is intended to resolve the public policy conflict based on sound public policy that outweighs public policy reasons for imposing strict liability.”); *Eddy*, 459 P.3d at 873 (“[I]t would be unjust to subject a common carrier to strict liability for any danger done by a material the carrier is required to transport by the law.”); *see also Walsh v. Mont. Rail Link*, 2001 Mont. Dist. LEXIS 3033.

The Montana Supreme Court intended for § 521’s common carrier exception to be construed narrowly. *See Eddy*, 459 P.3d at 875. The Montana Supreme Court noted that “any other activity BNSF engaged in that was not undertaken pursuant to its statutory duty, but alleged to have caused injuries to Plaintiffs, is not protected from strict liability.” *Id.* The application of § 521 to BNSF’s transportation of vermiculite must balance the need to protect individuals and communities from dangerous activities against the public policy to provide and protect the transportation of materials throughout the country as mandated by law. The logic of *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203 (E.D. Cal., May 12, 1976), proves persuasive.

In *Chavez*, eighteen boxcars loaded with bombs being hauled under a contract with the Department of the Navy exploded in Southern Pacific Transportation Company’s Antelope Yard in Roseville, California. *Id.* at 1203. The California District Court applied strict liability because “[t]he victims of [abnormally dangerous] activity are defenseless. Due to the very nature of the activity, the losses suffered as a result of such activity are likely to be substantial—an ‘overwhelming misfortune to the person injured.’” *Id.* at

1209. BNSF similarly stands in the better position have prevented, avoided, or mitigated the injury caused by the alleged presence of asbestos-contaminated materials at the Libby railway. The Court balances the essential transport of materials via common carrier against the need to provide redress for those in the worst position to avoid the risk of abnormally dangerous activity. This balance leads the Court to determine that § 521 applies to BNSF's transport of vermiculite, but does not apply to activities undertaken by BNSF outside its statutory duties as a common carrier. *Eddy*, 459 P.3d at 875.

Plaintiffs claim BNSF harbored a toxic asbestos dump in the Libby railway and was not required to do so to fulfill its role as a carrier of vermiculite. (Doc. 60 at 21.) Plaintiffs further allege that BNSF failed to control the asbestos hazard for decades. (Doc. 170 at 8.). BNSF disputes Plaintiffs' characterization of the Libby railway as a toxic "open-air repository for asbestos." (Doc. 189 at 3) (citations omitted). BNSF cites to scientific sampling studies done at and around the Libby railway which it claims demonstrates that a "reservoir of asbestos" did not exist. (Doc. 84 at 22-24.) A genuine dispute exists as to BNSF's practices at the Libby railway and the presence of asbestos and asbestos contaminated materials therein. A genuine dispute also exists as to the scope of BNSF's activities that fall within the auspice of BNSF's transport of vermiculite. The Court endeavors to develop the factual record to determine which of BNSF's activities fall outside its duties as a common carrier transporting vermiculite.

BNSF additionally claims that it cannot be held strictly liable for the alleged accumulation, maintenance,

or collection of asbestos at the Libby railyard when such accumulation, maintenance, or collection was not deliberate or intentional. (Doc. 84 at 21-22.) BNSF asserts that, even assuming Plaintiffs' allegations are true, Plaintiffs accuse BNSF of "inactivity" rather than "other activity" not covered by § 521. (Doc. 189 at 13.) Plaintiffs point to Restatement (Second) § 519, which provides that, "[t]he liability stated in this Section is not based on any intent of the defendant to do harm to the plaintiff." (Doc. 89 at 14.)

BNSF's contention fails. Strict liability under § 519 "arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity. It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur." Restatement (Second) of Torts § 519, *comment* d. The Montana Supreme Court determined in *Eddy* that BNSF's handling of asbestos constitutes an abnormally dangerous activity for which BNSF stands strictly liable under § 519. 459 P.3d at 873. The Montana Supreme Court's ruling in *Eddy* collaterally estopps BNSF from arguing against the application of strict liability for its handling of asbestos in and around the Libby railyard. Development of the record will eventually determine which statutory duties, if any, required BNSF to store and handle asbestos at the Libby railyard and would be subject to § 521's immunity from strict liability pursuant to the common carrier defense.

II. BNSF's Motion for Partial Summary Judgment.

BNSF's motion for partial summary judgment raises the same issues and relies on the same or substantially similar facts as BNSF's response to Plaintiffs' motion for summary judgment concerning the limited scope of the common carrier defense to BNSF's abnormally dangerous activity. (*See, e.g.*, Doc. 60); (Doc. 70); (Doc. 83); (Doc. 89); (Doc. 170); (Doc. 189.) BNSF's alleged facts and arguments fail to meet the standard of showing that no genuine dispute of material facts exists concerning Plaintiffs' strict liability claim. Those arguments also fail to show that BNSF is entitled to judgment as a matter of law concerning Plaintiffs' strict liability claim. *See* Fed. R. Civ. P. 56(a). BNSF fails to meet its burden as the moving party for its motion for partial summary judgment.

ORDER

Accordingly, IT IS ORDERED:

1. Plaintiffs' motion for summary judgment concerning whether BNSF's handling of asbestos in Libby, Montana constituted an abnormally dangerous activity (Doc. 57) is GRANTED IN PART. The Montana Supreme Court's decision in *Eddy* collaterally estopps BNSF from arguing that its handling of asbestos in Libby did not constitute an abnormally dangerous activity. Plaintiffs' motion for summary judgment concerning the scope of the common carrier defense to BNSF's abnormally dangerous activity (Doc. 57) is DENIED IN PART. Further development of the record will determine what portion or

portions of BNSF's handling of asbestos, if any, falls within BNSF's statutory duty to transport vermiculite and is subject to § 521's common carrier doctrine.

2. BNSF's Motion for Partial Summary Judgment is DENIED.

DATED this 16th day of October, 2023.

/s/ Brian M. Morris

Chief District Judge
U.S. District Court

**ORDER DENYING PETITION FOR
REHEARING EN BANC, U.S. COURT OF
APPEALS FOR THE NINTH CIRCUIT
(APRIL 7, 2026)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKSON WELLS, as Personal Representative for
the Estate of Thomas E. Wells, deceased; JUDITH
HEMPHILL, as Personal Representative for the
Estate of Joyce H. Walder, deceased,

Plaintiffs-Appellees,

v.

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant-Appellant.

No. 24-4802

D.C. No. 4:21-cv-00097-BMM
District of Montana, Great Falls

Before: CALLAHAN, CHRISTEN, and HURWITZ,
Circuit Judges.

Judges Callahan and Christen voted to deny the petition for rehearing en banc, and Judge Hurwitz so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition.

The petition for rehearing en banc (Dkt. No. 60)
is DENIED.

**ORDER ESTABLISHING
THE ASBESTOS CLAIMS COURT
AND CONSOLIDATING CASES,
SUPREME COURT OF MONTANA,
NO. AC 17-0694, *IN RE ASBESTOS LITIGATION*
(NOVEMBER 28, 2017)**

IN THE SUPREME COURT OF
THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,

Consolidated Cases.

Cause No. AC 17-0694

Before: MIKE MCGRATH, Chief Justice,
Michael E. WHEAT, Dirk M. SANDEFUR, James
JEREMIAH SHEA, BETH BAKER, LAURIE
MCKINNON, JIM RICE, Justices.

**ORDER ESTABLISHING
THE ASBESTOS CLAIMS COURT AND
CONSOLIDATING CASES**

In the aftermath of the W.R. Grace federal bankruptcy proceedings, the Court Administrator for the State of Montana Judicial Branch has identified at least 540 pending asbestos claim cases in the district courts. Considering that and other circumstances, this Court has determined there exists sufficient need to implement the provisions of the Asbestos Claims Court Act codified at §§ 3-20-101 through-105, MCA.

In particular, the Court has considered the need of all parties to have asbestos-related claims timely resolved, the extraordinary complexity and cost of these cases, and the enormous detrimental impact on the resources of Montana district courts if required to litigate these cases on an individual basis.

ACCORDINGLY, THE COURT HEREBY ESTABLISHES THE ASBESTOS CLAIMS COURT. District Court Judge Amy Eddy is appointed as the Asbestos Claims Judge, for purposes of pretrial proceedings only. The Court Administrator will appoint a Clerk for the Asbestos Claims Court.

Filing through Montana Courts E-Filing is mandatory for all filings with the Asbestos Claims Court. Filings in this matter will be facilitated by the case management system of the Clerk of the Montana Supreme Court. All filings with the Asbestos Claims Court are considered filings in a separate court and are to be accessed through and maintained by the Clerk of the Asbestos Claims Court and the office of Court Administrator, and are not part of the Montana Supreme Court caseload or the responsibility of the Clerk of the Montana Supreme Court, although the file stamp of that office will display on documents.

Pursuant to the authority granted by the Asbestos Claims Court Act and M. R. Civ. P. 42, the cases involving asbestos-related claims identified on Exhibit A attached hereto are hereby consolidated into the above-captioned matter for pretrial purposes only. As consolidation is for pretrial purposes only, no right of judicial substitution exists under § 3-1-804, MCA. Should any individual case ultimately proceed to trial, it will be tried in the county and before the district court having jurisdiction at the time of consolidation,

unless the Legislature fully funds the operation of the Asbestos Claims Court. If the Asbestos Claims Court is fully funded by the Legislature, then all provisions of the Asbestos Claims Court Act may be implemented at that time.

Within 30 days of the date of this Order, each attorney for one or more parties in any of the cases listed on Exhibit A, attached hereto, is directed to e-file a notice of appearance in the Asbestos Claims Court. In the notice of appearance, counsel must list the county and cause number of each case in which that counsel is appearing. In addition, counsel must provide a “lead party” name to be used by the Asbestos Claims Court for the entire set of cases in which that attorney represents a party—for example, “*Smith et al. v. W.R. Grace.*”

In addition, any attorney who represents a party in a case filed in a Montana district court involving an asbestos-related claim and not listed in Exhibit A is directed to file, within 30 days of the date of this Order, a notice of appearance in the Asbestos Claims Court. In the notice of appearance, counsel must list the county and cause number of the case in which that counsel is appearing. In addition, counsel must provide a “lead party” name to be used by the Asbestos Claims Court for the entire set of cases in which that attorney represents a party for example, “*Smith et al. v. W.R. Grace.*”

With the exception of the notices of appearances referenced above and service of process and filing of the pleadings identified in M. R. Civ. P. 7(a), all further action in the cases identified on Exhibit A, attached hereto, is STAYED pending further ruling by the Asbestos Claims Judge.

The Clerk of the Montana Supreme Court is directed to provide a copy of this Order and the attached Exhibit A to each attorney listed as counsel of record in any of the cases identified in Exhibit A. The Clerk is also directed to provide a copy of this Order to the Honorable Amy Eddy, to the Court Administrator's Office, to each District Judge for the State of Montana, to each Clerk of District Court for the State of Montana, to the Montana Secretary of State, to the Code Commissioner, and to the State Bar of Montana with the request that this Order be published on the State Bar's website and distributed electronically to the Bar membership.

DATED this 28th day of November, 2017.

/s/ Mike McGrath

Chief Justice

/s/ Michael E. Wheat

/s/ Dirk M. Sandefur

/s/ James Jeremiah Shea

/s/ Beth Baker

/s/ Laurie McKinnon

/s/ Jim Rice

Justices

**RELEVANT CONSTITUTIONAL AND
STATUTORY PROVISIONS AND
JUDICIAL RULE**

28 U.S.C. § 1652

State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Mont. Const. Art. II, § 3

Declaration of Rights

Section 3. Inalienable Rights.

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Mont. Const. Art. IX, § 1

Environment and Natural Resources

Section 1. Protection and Improvement.

- (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

- (2) The legislature shall provide for the administration and enforcement of this duty.
- (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Mont. Code Ann. Tit. 3, Ch. 20

Title 3. Judiciary, Courts

Chapter 20. Asbestos Claims Court

3-20-101. Definition.

As used in this part, unless the context requires otherwise, “asbestos-related claim” means an action brought for the recovery of monetary damages for personal injury, wrongful death, loss or consortium, or other injury arising out of an asbestos-related disease that is alleged to result from the mining of vermiculite, the processing of vermiculite, or the transfer, storage, installation, or removal of a product containing vermiculite.

3-20-102. Asbestos Claims Judge

- (1) A civil action involving an asbestos-related claim may be tried by a judge pro tempore or special master, who must be a member of the bar of the state, agreed upon in writing by the parties litigant or their attorneys of record, appointed by the supreme court as provided in 3-5-115, and sworn to try the cause before entering upon the duties in

trying the cause. Upon appointment, the individual must be designated as the asbestos claims judge. The right to a jury trial is not waived by the stipulation to and appointment of the asbestos claims judge.

- (2) The asbestos claims judge has the authority and power of an elected district court judge in the civil action involving an asbestos-related claim. All proceedings before the asbestos claims judge must be conducted in accordance with the rules of evidence and procedure governing district courts.
- (3) Any order, judgment, or decree made or rendered in an asbestos-related civil case by the asbestos claims judge has the same force and effect as if made or rendered by the district court with the regular judge presiding.
- (4) A party stipulating to have an asbestos-related claim heard by the asbestos claims judge may not file a motion for substitution of the judge pursuant to 3-1-804.
- (5) All filings relating to an asbestos-related claim must be filed with the clerk of court in the judicial district in which the claim arose. The parties shall provide a copy of each filing to the asbestos claims judge.

3-20-103. Asbestos Claims Court-Venue-Jury Pool

- (1) The asbestos claims judge may hear an asbestos-related claim in any venue stipulated by the parties as provided in 25-2-202 or in any venue otherwise determined by the

asbestos claims judge in accordance with a stipulation of the parties. In stipulating venue, the parties shall take into consideration the availability of courtroom facilities. The asbestos claims court may prepare a list of available courtroom facilities for consideration of the parties.

- (2) The pool of prospective jurors for an asbestos-related claim may be drawn from any county in accordance with a stipulation of the parties. The jurors must be drawn, as provided in 3-15-501 and 3-15-503, from the jury lists of the counties comprising the jury pool. The clerk of the district court for the district in which the trial is conducted shall notify the prospective jurors.

3-20-104. Operating Expenses-Asbestos Claims Administration Fund

The asbestos claims judge may employ the employees that may be required to carry out the duties under this part. All expenditures of the asbestos claims judge, including but not limited to salaries, travel expenses, office rent, office equipment, and supplies, must be paid out of the asbestos claims administration fund. The asbestos claims administration fund is the account in the state treasury in which the funding for the asbestos claims court is deposited.

3-20-105. Direct Appeal To Supreme Court

An appeal from a final decision of the asbestos claims judge must be filed directly with the supreme court of Montana in the manner provided

by law for appeals from the district court in civil cases.

Mont. R. App. P. 15.

Certification of questions of law.

(1) Definitions. In this rule:

- (a) “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.
- (b) “Tribe” means a tribe, band, or village of native Americans which is recognized by federal law or formally acknowledged by a State.

(2) Power to certify. The supreme court of this State, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another State, or of a tribe, or of Canada, a Canadian province or territory, Mexico, or a Mexican state, or a federal court, if:

- (a) The pending litigation involves a question to be decided under the law of the other jurisdiction;
- (b) The answer to the question may be determinative of an issue in the pending litigation; and
- (c) The question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

- (3) Power to answer. The supreme court of this State may answer a question of law certified to it by a court of the United States or by the highest court of another State or of a tribe, or of Canada, a Canadian province or territory, Mexico, or a Mexican state, if:
 - (a) The answer may be determinative of an issue in pending litigation in the certifying court; and
 - (b) There is no controlling appellate decision, constitutional provision, or statute of this State.
- (4) Power to reformulate question. The supreme court of this State may reformulate a question of law certified to it.
- (5) Certification order, record. The court certifying a question of law to the supreme court of this State shall issue a certification order and forward it to the supreme court of this State. Before responding to a certified question, the supreme court of this State may require the certifying court to deliver all or part of its record to the supreme court of this State.
- (6) Contents of certification order.
 - (a) A certification order must contain:
 - (i) The question of law to be answered;
 - (ii) The facts relevant to the question, showing fully the nature of the controversy out of which the question arose;
 - (iii) A statement acknowledging that the supreme court of this State, acting as

the receiving court, may reformulate the question; and

- (iv) The names and addresses of counsel of record and parties proceeding without counsel.
- (b) If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.
- (7) Notice, response. The supreme court of this State, acting as a receiving court, shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable.
- (8) Procedures. After the supreme court of this State has accepted a certified question, the rules and statutes governing briefs, arguments, and other appellate procedures govern proceedings. Procedures for certification from this State to a receiving court are those provided in the rules and statutes of the receiving forum.
- (9) Opinion-order. The supreme court of this State shall state in a written opinion the law answering the certified question or may by order determine that the certified question was improvidently accepted. The clerk of the supreme court shall send copies of the opinion or order to the certifying court and the parties.
- (10) Cost of certification. Fees and costs are the same as in civil appeals filed with the clerk of the supreme court of this State and must be equally

divided between the parties unless otherwise ordered by the certifying court.

- (11) Severability. If any provision of this rule or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.
- (12) Uniformity of application and construction. This rule shall be applied and construed to effectuate its general purpose to make uniform law with respect to the subject of the rule among States adopting it.

**COMPLAINT AND DEMAND FOR
JURY TRIAL, RELEVANT EXCERPTS
(SEPTEMBER 23, 2021)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JACKSON WELLS, as Personal Representative for
the Estate of THOMAS E. WELLS, deceased; and
JUDITH HEMPHILL, as Personal Representative
for the Estate of JOYCE H. WALDER, deceased,

Plaintiffs,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation, ROBINSON INSULATION COMPANY,
a Montana Corporation for profit, GROGAN
ROBINSON LUMBER COMPANY,
a Montana corporation for profit, and DOES A-Z,

Defendants.

No. _____

**COMPLAINT AND DEMAND FOR JURY TRIAL
PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff Jackson Wells, as Personal Representative for the Estate of Thomas E. Wells, deceased, is a resident of Sedro-Woolley, Washington. At the time

of his death, Thomas E. Wells was a resident of LaConner, Washington. Plaintiff Judith Hemphill, as Personal Representative for the Estate of Joyce H. Walder, deceased, is a resident of Libby, Montana. At the time of her death, Joyce H. Walder was a resident of Westminster, California.

2. Defendant BNSF Railway Company (BNSF) is a corporation organized and existing under the laws of the State of Delaware and is engaged in interstate commerce with its headquarters in Fort Worth, Texas. During the times and activities relevant to this action, BNSF was engaged in business activities in Montana. BNSF engaged in conduct that resulted in the accrual of this tort action in this District and Division.

3. Defendant Robinson Insulation Company (Robinson Insulation) is or was a Montana business corporation for profit with its principal place of business in Great Falls, Cascade County, Montana where Robinson Insulation operated a vermiculite expansion plant. Robinson Insulation engaged in conduct that resulted in the accrual of this tort action in this District and Division.

4. Defendant Grogan Robinson Lumber Company (Grogan Robinson) is or was a Montana business corporation for profit with its principal place of business in Great Falls, Cascade County, Montana. Grogan Robinson, individually and through its predecessors in interest and/or their subsidiaries and associates, sold, marketed, and distributed construction products, including asbestos-contaminated vermiculite insulation manufactured by the related entity Robinson Insulation, directly to end users, to other lumber companies, and to various other retail entities, including the retail facility operated by the Wood Products Defendants in

Libby, Montana. Grogan Robinson engaged in conduct that resulted in the accrual of this tort action in this District and Division.

5. Defendants Robinson Insulation and Grogan Robinson were related entities that operated on adjacent properties, shared common stockholders, owners, and managers, and were so insured. Together they handled the manufacture, sale, shipment, and delivery of the expanded vermiculite products.

6. Does A-Z are corporations or persons, whose identities are unknown at this time, and whose negligence and wrongful acts caused asbestos related mesothelioma in the listed Plaintiffs. Plaintiffs will seek to amend their complaint when the true names and capacities of Does A-Z are ascertained.

7. BNSF, Robinson Insulation, and Grogan Robinson engaged in conduct that resulted in the accrual of this tort action in this District and Division.

8. This Court has personal jurisdiction over Defendants whose business activities in this District are the subject of this case. Defendants have purposely availed themselves of jurisdiction and consented to jurisdiction by conducting business in this District and Division.

9. This Court maintains subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 (diversity of citizenship). The amount in controversy for each Plaintiff exceeds \$75,000.

10. Venue is proper in this Court under 28 U.S.C. § 1391 because Defendants Robinson Insulation are subject to personal jurisdiction in this District and Division.

GENERAL ALLEGATIONS

11. The Plaintiffs' decedents were community members of Libby, Montana, where vermiculite ore, intermixed with a highly toxic form of asbestos, was mined, processed, released, spilled, and deposited from 1923-1990. Plaintiffs' decedents had repeated and continuous exposures to asbestos, which was in large part released and emanated from accumulations of asbestos containing material harbored on properties owned and maintained by BNSF.

12. Plaintiffs' decedents were ignorant of the nature and extent of the life-threatening risks and injury involved.

13. The Plaintiffs' decedents incurred exposures to asbestos, for which Defendants are responsible, that were very similar in nature and extent, having occurred during an overlapping and coinciding time frame, in nearly identical locations in proximity to BNSF's railyard, and which resulted in parallel medical outcomes with both developing and dying from asbestos induced mesothelioma within several months of one another.

ALLEGATIONS AS TO BNSF

14. The following entities are all predecessors of the Defendant BNSF: Chicago, Burlington & Quincy Railroad Company ("CB&Q"), Atchison, Topeka & Santa Fe Railway Company, Great Northern Railway Company, Northern Pacific Railway Company, and Burlington Northern Railroad Company.

15. Through a series of mergers, the CB&Q, the Atchison, Topeka & Santa Fe Railway Company, the Great Northern Railway Company, the Northern

Pacific Railway Company, and the Burlington Northern Railroad Company have all merged into BNSF.

16. BNSF has assumed the liabilities of the Great Northern Railway Company and the Burlington Northern Railroad Company.

17. BNSF's active vermiculite operations began in the 1920s and continued until the last shipment of vermiculite left Libby in 1994. The Libby vermiculite was at all times inextricably intermixed with a highly toxic form of asbestos. The 70 years of vermiculite operations resulted in substantial asbestos contamination of BNSF properties and surrounding areas.

18. The ore was mined at Vermiculite Mountain, seven miles northwest of Libby and the asbestos-contaminated vermiculite concentrate was moved via a conveyor belt across the Kootenai River to the River Loading Facility, located 4.5 miles east of BNSF's railyard in Libby (the "Railyard"). BNSF constructed and oversaw the River Loading Facility for the exclusive benefit of Zonolite (later W.R. Grace) in furtherance of their common goal of profiting from the sale and distribution of the vermiculite concentrate across the country.

19. The airborne dust created during the processing and production of the vermiculite ore was sampled and found to contain approximately 40% asbestos.

20. The river loading process was extremely dusty. The loaded rail cars and the entire area were constantly coated in a layer of asbestos contaminated vermiculite dust. When hopper cars were loaded at the river site much loose vermiculite accumulated on the top of every car. From the 1950s to 1994, BNSF employees

riding in engines pushing the vermiculite cars to town described visible clouds of dust being produced while returning loaded cars from BNSF's River Loading Facility to its downtown Libby Railyard. These accumulations of dust and layers of asbestos contaminated vermiculite dust were not contained or transported and were instead released into the environment and deposited on BNSF's Libby properties contributing to the reservoir of asbestos containing material documented in the downtown Libby Railyard.

21. The Libby Railyard was the heart of BNSF activities in Lincoln County. It was located directly adjacent to downtown Libby, surrounded by Libby's residential neighborhoods where Plaintiffs' decedents resided, businesses, and parks. The Railyard was extensive, spanning the entire north end of downtown Libby. W.R. Grace's downtown Libby facility initially straddled, and later adjoined the BNSF Railyard property line and consisted of vermiculite storage, loading, and processing facilities. The storage and export facilities were left open to the public. Most children growing up in Libby recall playing in the area of the Railyard and in the piles of vermiculite located throughout the Railyard complex.

22. The Libby mine produced approximately 80% of the world's vermiculite ore, which up to 1970 amounted to over 29 billion pounds of ore and was estimated to exceed 35 billion pounds of ore between 1971 and 1981 alone. Based on analysis of the asbestos content of the vermiculite concentrate (ranging between 0.3% and 7% asbestos), the amount of asbestos which BNSF brought into downtown Libby amounted to between 193 million and 4.5 billion pounds between

1925 and 1981, and between 19.7 and 460 million pounds throughout the 1980s.

23. Grace's average daily production was between 500 and 1,000 tons of finished vermiculite concentrate per day in the late 1960s and 1970s, and between 800 to 1,000 tons per day in the 1980s. Based on vermiculite asbestos percentages as measured in the 1980s and a daily average of 750 tons, BNSF carried up to 105,000 pounds of Libby asbestos into downtown Libby per day in the late 1960s and 1970s and, based on a daily average of 900 tons per day, up to 126,000 pounds per day through the 1980s.

24. Asbestos sampling and remediation efforts on BNSF properties in Lincoln County did not begin until 2001, more than a decade after vermiculite mining operations ceased in Libby. At that time substantial asbestos contamination and visible vermiculite was still identified throughout its properties at the surface and reaching depths exceeding

4-6 feet in some locations. Remediation efforts on BNSF's properties continued for over a decade, yet in 2013 the EPA determined that additional cleanup at the Railyard was still needed.

25. Constant varied industrial activities took place at the Railyard throughout Plaintiffs' decedents' periods of exposure, resulting in disturbance of the asbestos containing dirt, dust, and vermiculite ore documented at the site. These railroad activities occurred in close proximity to, or direct contact with, the ubiquitous visible vermiculite at the site, resulting in the creation of consistent clouds of visible dust. An average of 20 non-stop trains consisting of up to 100 cars travelled through the Libby Railyard at 50 mph on a given day.

Asbestos containing dust produced through active disturbance of vermiculite, asbestos contaminated soil and other surfaces would remain suspended for many hours as it drifted throughout the Libby community. Even just the wind blowing would cast dust from the downtown Libby Railyard into the neighboring Libby community. Given the reservoir of asbestos containing waste present in the Railyard throughout all relevant periods, disturbances, unrelated to transport of vermiculate, ranging from the regular industrial level activities to routine maintenance activities and even normal weather events resulted in the casting of asbestos dust into the neighboring Libby community.

26. The EPA has stated that sources of asbestos contamination are, at least in part, from properties, railroad tracks, and rights-of way owned, leased, and maintained by BNSF, as well as from various BNSF operations performed at a number of locations at or near the asbestos mine facility, and that during such operations, vermiculite containing amphibole asbestos was released to the environment through spillage from the rail cars causing it to accumulate over time.

27. More than a decade after vermiculite operations had ceased in Libby, sampling performed during routine maintenance activities in the downtown Libby railyard still demonstrated airborne asbestos fiber levels of up to 14 f/cc. This is an airborne asbestos level more than 150,000 times greater than the EPA's Libby Asbestos Reference Concentration (RfC) and 140 times higher than OSHA's permissible exposure limit for workplace asbestos exposure.

28. BNSF played a central role in the vermiculite operations in Libby, far exceeding a common carrier/shipper relationship. BNSF took upon itself to

perform economic analyses of the vermiculite operations; BNSF participated in developing new uses for vermiculite products and assisted in marketing the vermiculite product to various customers; BNSF funded geologic surveys of the vermiculite deposit; BNSF engaged in several of its own geo-chemical samplings/analyses of the vermiculite ore and associated constituents; and BNSF oversaw dust control, safety, construction, and modifications of the Grace shipping facilities. BNSF transported the entirety of the mined payload of Vermiculite Mountain and also sold land to Grace, and leased land and rail facilities to Grace for a negligible amount. Similarly, Grace leased and sold land to BNSF in furtherance of their common design of profiting from the export of asbestos-laden vermiculite. Grace and BNSF granted each other easements and access agreements on/across their respective adjoining properties.

29. Emblematic of Grace and BNSF acting in concert in these operations was the River Loading Facility. The River Loading Facility was constructed and operated throughout its existence on BNSF property, for which Grace paid minimal rent. BNSF oversaw all construction of and modifications to the River Loading Facility. This included reviewing and approving plans for all River Loading Facility dust control equipment prior to installation. In requesting BNSF's review and approval of the 1971 additional dust control facilities, Grace informed BNSF that they were being installed to "comply with Air Pollution Control Regulations in the state of Montana."

30. Starting in the 1920s, BNSF's knowledge of the presence of asbestos in the Libby vermiculite is demonstrated in publications and BNSF company

documents. By 1925, BNSF was one of the first entities to perform a geo-chemical analysis of the Libby Ore. Over the ensuing years, BNSF showed a continued interest in the economic potential of the Libby Ore and development of the resource. BNSF issued reports on the vermiculite operations prepared by its Division of Economic Research, sampled/tested the ore several times, and visited the mine site on multiple occasions. Correspondence beginning in 1929 between G.R. Martin, Vice President of the BNSF predecessor, demonstrates BNSF's detailed knowledge, including that "the vermiculite deposit near Libby, which is more extensive than other known similar deposits in this country, is accompanied by asbestos." In 1959 the railroad funded a geologic study of the mineral deposit which, among other things, provided that:

Fibrous amphibole asbestos, because its specific gravity is very near that of vermiculite, causes much trouble in milling the lower grade ores in which the asbestos is abundant. If a process could be perfected to make a clean separation of vermiculite and asbestos, both products would be marketable . . .

This and other documents unequivocally provided BNSF with notice that the Libby vermiculite was inextricably contaminated with asbestos.

31. BNSF funded further geologic studies of the mineral deposit similarly confirming the presence of asbestos at the site and the inability to separate the asbestos from the vermiculite. In addition to funding geologic studies, BNSF's Mineral Research and Development Department and its Geology Department investigated, tested, and gathered samples of the vermiculite

ore. Throughout the years, BNSF discussed possible rates with the mining company for the shipment of Libby asbestos by rail from Libby.

32. By 1977 or earlier, and thereafter, railcars carrying the Libby Ore were marked with asbestos warning placards that read as follows:

CAUTION

Contains asbestos fibers.

Avoid creating dust.

Breathing asbestos dust may
cause serious bodily harm.

33. The Occupational Safety and Health Act was passed in 1970 requiring employers to test the level of asbestos in their workplace. Despite BNSF's knowledge that asbestos was present in the Libby Ore and that Libby Ore was being released, spilling, and depositing on BNSF properties, BNSF failed to conduct any testing for the presence of asbestos in its workplaces in Lincoln County, including the downtown Libby railyard.

34. BNSF had early and continuous knowledge of the hazards of asbestos exposure, including bystander exposures, as well as standards of care for detection and prevention of such hazards. Beginning in the late 1920s, asbestos related disease was generally recognized as a deadly health hazard throughout medical and industrial hygiene publications. The connection between asbestos exposure and cancer was established by the 1940s within the medical and industrial hygiene communities.

35. The American railroad industry, and specifically BNSF and its predecessors, have been aware of the asbestos hazard for decades. This knowledge is

well documented by the 1930s and thereafter through documents including those known as American Association of Railroad (AAR) Documents, the Alton Railroad Documents, the National Safety Council Documents and BNSF company documents. The record also demonstrates BNSF's contemporaneous understanding of applicable safety regulations and its regular discussion of their impact on its operations. In addition to the applicable safety regulations and general industrial hygiene practices to which BNSF was subject, the Railroad set forth its own self-imposed safety responsibilities which similarly demonstrate its knowledge of these protective principles. BNSF had an extensive exposure to applicable industrial hygiene standards of care throughout the years that it shipped Libby vermiculite. BNSF maintained a Medical Department, an Industrial Hygiene Department, a Safety Department, and a Geology/Mineral Research Department.

36. BNSF train crews operated the local switching train, known as the "Libby Logger," which brought the asbestos-contaminated vermiculite from the so-called "river loading facility" located on BNSF property some 4.5 miles east of town, adjacent to the base of W.R. Grace's mining operation, into downtown Libby. BNSF officials were responsible for the crews' safety, including among other responsibilities identifying risks of injury, warning others of those risks, and preventing harm by eliminating risks.

37. BNSF officials toured W.R. Grace's facilities, including the mine, where he saw government required signs in the mine with the following warning: "Asbestos. Dust Hazard. Avoid Breathing Dust . . . Breathing Dust May Be Hazardous to Your Health."

38. W.R. Grace leased land to and from BNSF, both adjacent to BNSF's railyard in Libby, where it operated vermiculite bagging plant and boxcar loading facility, and at the River Loading Facility located on BNSF's property some seven miles out of town, adjacent to the base of W.R. Grace's mining operation. BNSF officials inspected the downtown bagging plant operations because it was located on the railroad property, and observed the Grace employees filling the bags with vermiculite, which bags contained warning labels which stated: "Caution. Contains asbestos fibers. Breathing asbestos dust may cause serious bodily injury."

39. BNSF officials received requests by Grace for permission to make modifications to their lease-hold improvements on BNSF property, including equipment to control the toxic asbestos containing dust.

40. BNSF officials were integral to controlling the enormous amount of dust pollution being caused by BNSF's transport of Grace's asbestos laden vermiculite through the Libby community. They were well aware of the dust blowing off and loose vermiculite spilling from the tops of the loaded vermiculite railroad cars, and in fact ordered the crew to place Grace's vermiculite cars behind the local lumber mill's wood chip cars because of complaints received from the processing company that received the wood chips about the vermiculite dust contaminating the wood chips.

41. BNSF had the authority to remedy the dusty conditions, and the Libby Log crew also complained to BNSF officials about the large amount of dust blowing off the top of the loaded hopper cars coming from Grace's river loading facility. Emblematic of BNSF's

control over Libby railroad operations, BNSF officials went to Grace and told them that this had to stop or the railroad would not move the cars. Tragically, BNSF officials did not enforce this edict to W.R. Grace and the asbestos pollution continued unabated.

42. Nor did BNSF officials take action to enforce this edict or sound a warning to BNSF workers or the Libby community when directly confronted with notice that the vermiculite contained toxic asbestos. After a BNSF crew member first saw a placard on the Grace vermiculite cars warning that the vermiculite loaded cars contained asbestos, he removed the placard and brought it to a meeting to address his safety concerns that was attended by BNSF management officials and the manager of Grace's Libby mine. Yet despite the presence of BNSF officials who were in charge of site safety—including the need to identify risks of injury, to warn others of those risks, and to prevent harm by eliminating risks of harm—BNSF did nothing following this meeting, and the railroad's asbestos pollution of Libby continued unabated, claiming ever more victims with the passage of time.

FIRST CLAIM
Negligence v. BNSF
(All Plaintiffs)

43. All paragraphs above are incorporated by this reference.

44. Plaintiffs' decedents resided or remained in proximity to the real property of BNSF and were thereby exposed to asbestos dust from BNSF's property and operations.

45. Throughout their years of exposure, the Plaintiffs' decedents lived in an environment that caused them to be exposed to and to inhale asbestos dust.

46. At all times Plaintiffs' decedents were ignorant of the nature and extent of the life-threatening risks and injury involved, and would not have continued to remain in such an environment if they had known the true facts.

47. Without knowledge of the nature and extent of the asbestos hazard, Plaintiffs' decedents were denied the option of avoiding exposure, demanding dust control or changing residence.

48. At all times BNSF knew or should have known of the asbestos in the vermiculite and knew or should have known of the hazards to human health of asbestos exposure and had a continuing duty to gather information, to prevent toxic dust from collecting upon and escaping from its property, and to warn Plaintiffs' decedents and others who would be harmed by said asbestos containing dust.

49. BNSF was the property owner of the river loading facility and portions of the downtown export facility where asbestos-laden vermiculite was loaded onto train cars. BNSF paid for, oversaw, and operated the river loading facility. BNSF oversaw and inspected the downtown export facility which was part of its larger downtown Railyard complex. BNSF maintained a contractual relationship with W.R. Grace, where W.R. Grace employees provided the labor to load the toxic vermiculite concentrate into BNSF train cars. Throughout the entirety of the contractual relationship, BNSF had reason to know of the hazards associated with the asbestos contaminated vermiculite

concentrate, yet failed to take or require any precautions to eliminate or mitigate the toxic dust produced. BNSF undertook the responsibility for oversight of dust control and safety on their property and at all times retained control to inspect and monitor. At no time during the contractual relationship was there an adequate dust control system, protection for workers, or adequate procedures to ensure asbestos contaminated vermiculite ore did not escape into the Libby community. During the vermiculite loading, movement into Libby, switching, and storage operations, asbestos contaminated vermiculite was spilled, dumped, and otherwise released onto BNSF property in Lincoln County and thereafter disturbed and distributed by BNSF's consistent and constant industrial activities and other soil disturbances resulting in the entrainment of asbestos fibers into the air and onto property in Lincoln County.

50. BNSF had reason to recognize the loading of asbestos laden vermiculite concentrate created a particular risk of physical harm unless special precautions were taken. As a result of the failure of W.R. Grace to take reasonable care to take such safety precautions, asbestos contaminated the railroad loading facility exposing workers and blew off and spilled from railroad cars thereby contaminating the area adjacent to the railroad line in Lincoln County.

51. BNSF had a non-delegable duty to ensure that adequate dust control and safety precautions were taken by the contractor W.R. Grace during the course of the river loading and downtown export operations, which posed peculiar risks of physical harm and was inherently dangerous.

52. BNSF was the property owner of the downtown Libby Railyard. That Railyard was contaminated with asbestos laden vermiculite. BNSF had reason to know of the hazards associated with the asbestos contaminated vermiculite, yet failed to take any precautions to eliminate, contain, or mitigate the toxic dust accumulating therein and escaping into the Libby community.

53. BNSF was negligent, including as follows:

- (a) in failing to inquire, study and evaluate the dust hazard to human health;
- (b) in failing to take measures to prevent toxic dust from accumulating upon and escaping from its property;
- (c) in maintaining an unreasonably dangerous and/or hidden and lurking danger, in the form of toxic dust, on its property;
- (d) in failing to adequately eliminate, control and/or contain the toxic dust present on its property and allowing this dangerous toxin to escape therefrom;
- (e) in failing to exclude children, and others, attracted to its property in Lincoln County;
- (f) in failing to warn Plaintiffs' decedents of the true nature of the hazardous effects of the dust;
- (g) in failing to conform its activities in Lincoln County to applicable statutes (e.g., § 50-78-101 M.C.A. et seq. and 29 U.S.C. Ch. 15) and regulations;

- (h) in failing to conform its activities in Lincoln County to common-law standards of care as well as its own plans, rules and standards;
- (i) in negligently breaching its non-delegable duty to ensure that adequate dust control and safety precautions were taken by W.R. Grace during the course of their loading and export operations; and
- (j) by acting in concert and in furtherance of a common plan, objective, and enterprise with Zonolite/Grace.

54. As a direct and proximate result of the conduct of BNSF as described above, Plaintiffs' decedents contracted asbestos related mesothelioma and died as a result thereof, and incurred the damages alleged herein.

SECOND CLAIM
Common Law Strict Liability v. BNSF
(All Plaintiffs)

55. All paragraphs above are incorporated by this reference.

56. Defendant BNSF failed to control asbestos contaminated vermiculite present during the operation of their business in Lincoln County thereby creating an abnormally dangerous condition and causing Plaintiffs' decedents to be exposed to asbestos, an extra hazardous and abnormally dangerous substance.

57. Defendant BNSF maintained its property in an abnormally dangerous condition thereby causing the release of asbestos contamination and exposure of Plaintiffs' decedents to deadly asbestos. BNSF's

premises were maintained in an abnormally dangerous condition and its business activities in handling, storing, loading, and using asbestos and asbestos contaminated products were abnormally dangerous in that:

- (a) said BNSF property and business activities created a high degree of prior, present, and continuing contamination in the form of exceedingly toxic asbestos, which created a high degree of risk of harm to Plaintiffs' decedents and others;
- (b) there was and is a strong likelihood that the harm resulting from said BNSF property and business activities and exposure to asbestos is great;
- (c) the risk of harm caused by BNSF's property and BNSF's storing, handling, loading, and using asbestos contaminated vermiculite cannot be reasonably eliminated for those humans living and working in proximity to BNSF's property and BNSF's abnormally dangerous business activity;
- (d) said harboring of asbestos on BNSF's property and business activities are not a matter of common usage;
- (e) BNSF's property was located in and abnormally dangerous business activities were carried on within the town of Libby and adjacent areas, which were places that were inappropriate for the release of asbestos contamination; and

- (f) the dangerous attributes of BNSF's property and business activities completely outweigh the value of those activities to the community.

58. The dangers of BNSF's property and business activities for the locality where Plaintiffs' decedents resided, worked, or remained were so great that despite any usefulness of their activities and of the asbestos contaminated vermiculite under its control, BNSF should be required as a matter of law to pay for any harm caused.

59. BNSF harbored an abnormally dangerous condition at its downtown Libby railyard by maintaining a reservoir of asbestos contaminated material thereon and by failing to take measures to prevent toxic dust from collecting upon and escaping from its property.

60. BNSF is strictly liable to the Plaintiffs for damages caused by Plaintiffs' decedents exposure to deadly asbestos caused by the abnormally dangerous condition of BNSF's property and BNSF's abnormally dangerous business activities.

61. As a direct and proximate result of the abnormally dangerous condition of BNSF's property and BNSF's abnormally dangerous business activities, Plaintiffs' decedents were exposed to unreasonably dangerous and hazardous asbestos, contracted and suffered from asbestos related mesothelioma and died as a result thereof, and incurred the damages as alleged herein.

THIRD CLAIM
Punitive Damages v. BNSF
(All Plaintiffs)

62. All paragraphs above are incorporated by this reference.

63. BNSF's acts and omissions were willful, reckless, and constituted actual malice. Although BNSF knew or had ample reason to know that its acts or omissions created a high degree of risk of harm to the Plaintiffs' decedents, BNSF nevertheless deliberately acted in conscious disregard of and indifference to the risk imposed upon the Plaintiffs' decedents by their ongoing exposure to asbestos such that it is appropriate to impose punitive damages in an amount sufficient to punish BNSF, deter similar conduct, and to serve as an example and warning to other legal entities similarly situated that conduct of the kind engaged in by BNSF is unacceptable in our society.

[. . .]

SEVENTH CLAIM
WRONGFUL DEATH
(All Plaintiffs)

82. All paragraphs above are incorporated by this reference.

83. As a direct and proximate result of the actions of the Defendants as alleged above, Plaintiffs' decedents suffered from asbestos related mesothelioma, and died as a result thereof, incurring the damages alleged herein. The heirs of Plaintiffs have suffered the loss of their care, comfort, society, and support and have incurred damages as alleged herein.

DAMAGES

84. All paragraphs above are incorporated by this reference.

85. As a direct and proximate result of the acts of the Defendants, the Plaintiffs' decedents have suffered:

- a. Loss of enjoyment of established course of life;
- b. Loss of services which could no longer be performed;
- c. Loss of earnings and/or earning capacity;
- d. Physical, mental and emotional pain and suffering;
- e. Medical expenses;
- f. Great grief and sorrow;
- g. The Plaintiffs' decedents having died as a result of asbestos related mesothelioma, the heirs have lost the care, comfort, society, and support of said Plaintiffs' decedents and have suffered other damages; and
- h. Punitive damages in an amount sufficient to punish BNSF, deter similar conduct, and to serve as an example and warning to other legal entities similarly situated that conduct of the kind engaged in by BNSF is unacceptable in our society.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs prays for damages against the Defendants as follows:

1. Reasonable damages for lost enjoyment of established course of life, past and future;
2. Reasonable damages for loss of services which can no longer be performed;
3. Reasonable damages for physical, mental and emotional pain and suffering;
4. Reasonable damages for medical expenses, rehabilitation expenses, and related expenses incurred;
5. On behalf of those so injured, the Personal Representatives pray for distinct and separate assessment and recovery of reasonable damages for the heirs' loss of care, comfort, society and support of the deceased by reason of the wrongful death of their loved ones;
6. Advance payment of past and outstanding medical expenses and special damages not reasonably in dispute;
7. Reasonable damages for loss of earnings and/or earning capacity;
8. Reasonable damages for grief and sorrow;
9. For costs of suit;
10. For punitive damages; and
11. For such further relief as is just and equitable under the circumstances.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury.

DATED this 23rd day of September, 2021.

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McGARVEY LAW

Electronically signed by:

/s/ Jinnifer Jeresek Mariman

Jinnifer Jeresek Mariman

Attorneys for Plaintiffs

**APPELLEES' ANSWERING BRIEF,
FILED IN THE NINTH CIRCUIT,
RELEVANT EXCERPTS
(MAY 16, 2025)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKSON WELLS, as Personal Representative for
the Estate of Thomas E. Wells, deceased; JUDITH
HEMPHILL, as Personal Representative for the
Estate of Joyce H. Walder, deceased,

Plaintiffs-Appellees,

v.

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant-Appellant.

No. 24-4802

On Appeal from the United States District Court for
the District of Montana No. 4:21-cv-00097-BMM
Hon. Brian M. Morris, Chief District Judge

APPELLEES' ANSWERING BRIEF

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STATEMENT OF THE CASE

I. Facts

A. Parties

This brief refers to Jackson Wells, as Personal Representative for the Estate of Thomas E. Wells, deceased; and Judith Hemphill, as Personal Representative for the Estate of Joyce H. Walder, deceased, as Plaintiffs. When apparent from the context, reference to Plaintiffs includes the decedents, Thomas Wells and Joyce Walder.

B. Libby Vermiculite

BNSF's active vermiculite operations in Libby, Montana, began in the 1920s and continued until vermiculite operations ceased in 1990. 3-SER-561; 2-ER-250. "Libby was one of only three places in the world where vermiculite was mined, and Grace's operations in Libby were the largest, producing approx-

imately 80% of the world's vermiculite ore.” 2-ER-283. The asbestos-containing vermiculite ore was mined on Vermiculite Mountain, approximately seven miles outside of Libby, milled at the mine site, transferred on a conveyor belt across Kootenai River, poured into BNSF's railcars, and transported five miles into BNSF's downtown Libby railyard. 2-ER-250–53; 4-SER-1016. There it began to accumulate.

C. BNSF's Downtown Libby Railyard

The Libby railyard was the heart of BNSF activities in Lincoln County, located directly adjacent to downtown Libby, where Plaintiffs resided and recreated. 2-ER-254–55; 3-SER-706, 709–10, 714–15. The Libby railyard was extensive, spanning the entire north end of downtown Libby, surrounded by ballfields, parks, businesses, and residences:



3-ER-688; 4-SER-1009 (photo 4/25/77, red outline of railyard added).

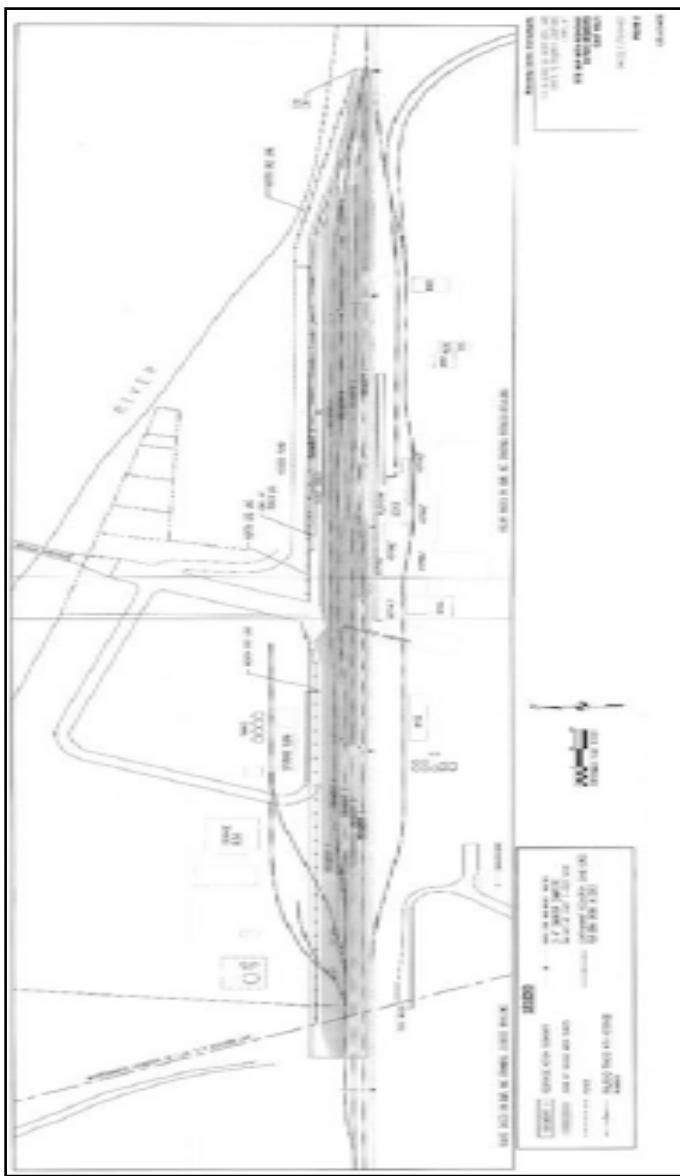
From the mid-1920s until the mine closed in 1990, nearly 10 billion pounds of vermiculite containing asbestos moved through downtown Libby. 3-SER-570–71; 4-SER-970, 1020. Tragically, a dangerous amount of it was discarded and remained in the Libby railyard.

The Environmental Protection Agency (EPA) found that BNSF’s properties, railroad tracks, and rights-of way were sources of asbestos contamination and that, during BNSF’s operations, vermiculite containing asbestos accumulated on the Libby railyard over time. 4-ER-818. Undeterred by previous rebukes or this Court’s standard of review, BNSF highlights EPA reports when they report “lower asbestos levels” and challenges the reports when they report higher levels. *See* Appellant’s Br. at 56–57 (hereafter AOB-___). As the unanimous Montana Supreme Court concluded in *BNSF Railway Co. v. Eddy*, “although BNSF cherry picks the record to cite to isolated favorable test results, it is beyond dispute that extensive asbestos existed, at high levels, on BNSF’s properties.” 459 P.3d 857, 869 (Mont. 2020).

Indeed, when remediation efforts on BNSF properties in Libby began in 2001—more than a decade *after* vermiculite mining ceased in Libby and the last shipment of vermiculite left the Libby railyard—substantial asbestos contamination and visible vermiculite was identified throughout BNSF’s properties, both at the surface and reaching depths exceeding four to six feet in some locations. *See e.g.*, 4-ER-818–19 (“[s]ampling shows asbestos, a hazardous substance, is present in soil, raw-ore, ore-concentrate and other soil-like materials.”) Even thirteen years after BNSF ceased shipment of vermiculite, the Libby railyard

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remained significantly contaminated with asbestos. 2-ER-263, 4-ER-818, 4-ER-918, 921.



3-SER582–84; 4-SER-1005–07 (BNSF railyard with areas of visible vermiculite indicated in yellow); 2-ER-255 (visible vermiculite found along tracks and within the railyard, with analytical results showing asbestos levels in soil from two to five percent).

Multiple cleanup efforts mandated by the EPA over the next ten years, after which portions of the railyard still could not be excavated to safe levels, led instead to parts of the railyard being capped and backfilled. 4-ER-923–24. The volume of material removed from the downtown Libby railyard demonstrates its substantial contamination:

- 28,182 linear feet of rails and other track materials removed;
- 8,000 rail ties removed (analysis post-decontamination showed asbestos fibers permeated ties; ties were shipped to a qualified landfill in Great Falls, Montana, for final disposal);



4-ER-912.

- 12,860 tons of soil removed (disposed of in asbestos cell of Lincoln County Landfill); and



4-ER-913.

- Former dump area excavated with vermiculite and asbestos present at depths greater than six feet.

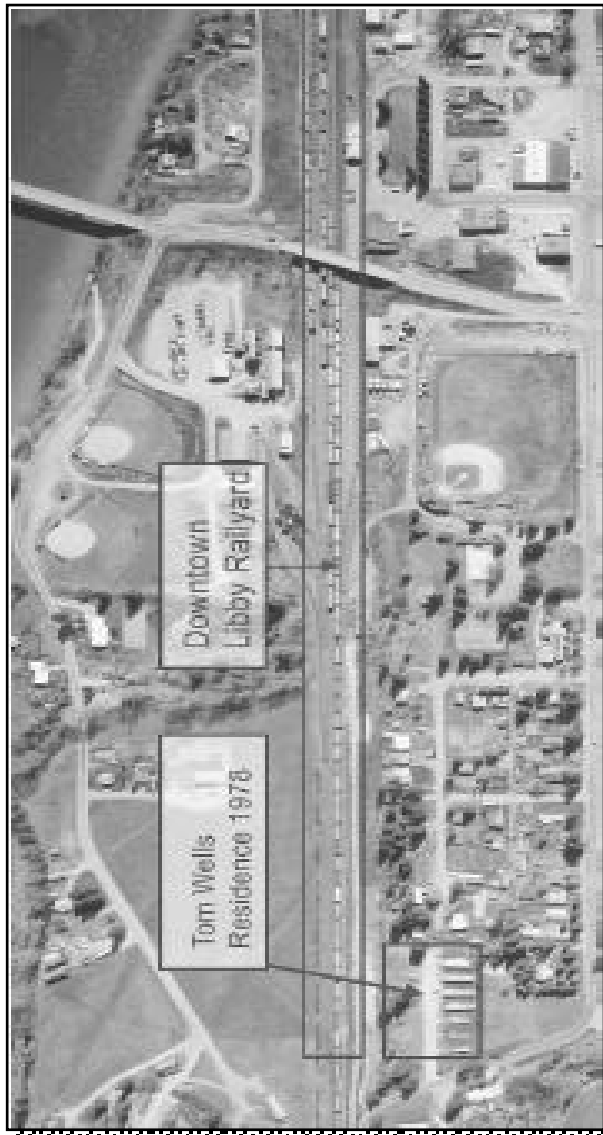
3-SER-577; 4-ER-923–24.

The accumulation of asbestos waste in the railyard throughout all relevant periods led to asbestos dust being cast into the neighboring Libby community through disturbances unrelated to transport of vermiculite, from regular industrial level activities to routine maintenance and even normal weather events.

2-ER-255-56 (soil containing two to five percent asbestos when disturbed would have high potential for fibers to be released and become airborne).

D.Plaintiffs' Exposures to Libby Asbestos

Thomas Wells worked for the Forest Service in Lincoln County, Montana, from June through September, and most of November 1976 through 1978 and from July to August in 1981. 3-SER-591-93; 3-SER-714-15. He lived in various places during those times, 3-SER-717-18, but critical here, from June to November 1978, Wells lived in a trailer home abutting the Libby railyard. 3-SER-591-93, 723. It was hot and dusty with no air conditioning. Wells left the windows open and frequently had to vacuum, dust, and shake out the blankets because of the dust that accumulated in the trailer. 3-SER-721-22. Wells described the dust that would blow off the railyard if the wind was blowing as making "quite a mess." 3-SER-721.



4-SER-1017.

Wells would routinely walk the length of the Libby railyard in downtown Libby. Wells was diagnosed with the fatal cancer mesothelioma in 2019 shortly after his retirement as a schoolteacher. He died just three months later at age 65, leaving behind two young adult sons. 3-SER-650, 713; 4-SER-1011.

Joyce Walder attended school in Libby from first through twelfth grade. Walder lived in Libby in 1954–1972 and 1976–1978, and made continuous visits from 1979 through 2009. 3-SER-705–706, 709–10. Her family lived in various homes in the Libby area, including one abutting the rail line near the Libby railyard in 1968–1969. 3-SER-699–702. As a child, Walder spent substantial time near the Libby railyard. She ran track throughout middle and high school at Legion field adjacent to the railyard to the south; she attended annual Logger Days festivals at Legion field; she watched her brothers play baseball at the municipal ball fields abutting the railyard to the north; and she spent substantial time at her best friend's home immediately to the south of the railyard.



4-ER-930.



4-SER-1015.

During summer months, Walder spent many days at the city pool just south of the railyard and in downtown Libby. 3-SER-696-98, 702-05. Walder also spent a considerable amount of time walking BNSF's tracks from her home to get to various Libby destinations. Because it was open to the public, Walder, like most children growing up in Libby, would play in the area of the railyard where piles of vermiculite accumulated. 3-SER-697.



4-SER-1018 (child with bicycle crosses tracks on railyard).

Walder was diagnosed with mesothelioma in 2020 and died just five months later at age 66. She left behind her husband and four young adult children. 3-SER-638, 644–45, 712; 4-SER-1012.

E. Dangers of Libby Amphibole Asbestos

Asbestos dust can be invisible at dangerous concentrations. 3-ER-505. No safe limit or threshold of exposure is known, and any exposure to asbestos carries some risk to health. Mesothelioma can occur after relatively low or intermittent levels of exposure for a very brief period. 3-SER-614–15, 637; 3-ER-504. In mesothelioma patients who “lived next to a source of exposure, in every instance like that, for mesothelioma, there’s no safe level of that type of exposure.” 3-ER-504.

Analysis of the asbestos content of the post-beneficiation Libby vermiculite concentrate—denoted as Libby amphibole asbestos—verified ranges between 0.3% and 7% asbestos. 3-SER-560, 570–72. The EPA’s toxicity assessment of Libby amphibole asbestos determined a reference concentration (RfC) of 0.00009 f/cc. 3-SER-612, 665–68; (RfC sets forth what EPA determines to be an estimate of daily exposure over a lifetime that is unlikely to cause appreciable risk of adverse health effects); 3-SER-655–68 (“[T]he reference concentration is a way for us to know, is it a lot or a little? Gives us something to compare against.”). The Libby vermiculite was at all times inextricably intermixed with highly-toxic Libby amphibole asbestos. 3-SER-570–71. This evidence simply does not support BNSF’s claim that “it was confirmed to be true” that dangerous levels of asbestos were removed from finished vermiculite concentrate. *See* AOB-6, citing 3-

ER-693–96 (county health officer’s testimony that, prior to learning in 1999 of public health concerns regarding Libby vermiculite, they had been “reassured” that through the wet mill process and the cleaning up of the processed ore, the risk was reduced where “we shouldn’t have to worry.” As the evidence demonstrates, this assurance proved not to be true. *See, e.g.*, 3-SER-574–75, 679–81, 692 (1982 EPA study of high asbestos content in post-beneficiated vermiculite shipped by BNSF: Grade 1, 4-6% fibrous asbestos; Grade 2, 4-7% percent fibrous asbestos; Grade 3, 2-4% percent fibrous asbestos); 3-SER-658–61 (when disturbed as little as 0.001% asbestos in vermiculite can create airborne asbestos levels exceeding OSHA limit).

Dr. Julie Hart, Plaintiffs’ industrial hygiene expert, testified that the activities and subsequent dispersal from the railyard, as well as the Plaintiffs’ geographic proximity to the railyard, either by living or playing or just simply walking down the street, resulted in substantial exposure to Libby amphibole asbestos. 3-SER-613–14. And Dr. Julian Marshall, Plaintiffs’ expert on airborne asbestos exposure, analyzed Plaintiffs’ lifetime exposures to concentrations of Libby amphibole asbestos from dust created by four scenarios of BNSF’s activities relative to the EPA’s RfC. Marshall opined that, when considering only the exposure to asbestos emissions from the contaminated railyard, Wells’ exposure was between 5 and 14 times higher than the RfC of 0.00009 f/cc, and Walder’s was between 2.6 and 7 times higher. 3-SER-673–74. Dr. Steven Compton, Plaintiffs’ matter physics expert, testified that less than 1 percent asbestos in soil translates to 10 billion asbestos fibers per gram of

soil. 3-SER-681, 684–85. Once disturbed by any means, including naturally occurring wind, asbestos will become airborne and can remain suspended in the air for hours or days traveling into the adjacent community of Libby. 3-SER-686–89. He ultimately opined that substantial amounts of airborne asbestos emanated from BNSF’s Libby railyard. 3-SER-694–95.

Dr. Brent Staggs, Plaintiffs’ medical expert, opined to a reasonable degree of medical certainty that both Wells’ and Walder’s exposures from the BNSF railyard and surrounding activities were a substantial contributing factor to their development of malignant mesothelioma. 3-ER-512–13. Walder’s findings were further confirmed through tissue biopsied from her chest prior to her death, analyzed through digestion and electron microscopy, and determined to contain substantial levels of Libby amphibole asbestos fibers and no other types of asbestos. 3-SER-639–42 (“78-or 80,000 [Libby amphibole asbestos] fibers per gram of tissue”); 4-SER-1013–14; 3-SER-651 (no suitable tissue for Wells). BNSF called no medical experts at trial.

F. BNSF Knew Asbestos in Vermiculite Being Shipped Was Abnormally Dangerous

Despite BNSF’s protestations that it had no way of knowing the vermiculite was hazardous, Grace, the shipper of the vermiculite, identified the presence and hazards of asbestos. For example, BNSF railcars were

being placarded¹ as early as September 1977. 3-SER-563–65. The placard provided:

CAUTION
PRODUCT CONTAINS ASBESTOS FIBERS
AVOID CREATING DUST
BREATHING ASBESTOS DUST MAY
CAUSE BODILY HARM

CAUTION Avoid Causing Dust Breathing Dust May Be Harmful To Your Health Use With Adequate Ventilation Or With Respiratory Protection

3-SER-570; 4-SER-1008.

In addition to Grace's warnings,² the evidence showed BNSF had independent knowledge of the danger. Going back to the 1920s, numerous publications and internal BNSF documents demonstrated that

¹ *Placard* is a 1989-originating term of art for Department of Transportation durable, square-on-point labels used to identify the hazard class of materials being transported. 3-SER-727–28, 739. At trial, the term “placard” was also used to describe various warning stickers affixed to the side of BNSF's railcars. 3-SER-730–31, 744–45; 4-SER-1008.

² BNSF claims witnesses testified they never saw any sign on a Grace railcar, but those witnesses actually testified that they could not recall. *See also* 3-SER-730. In any event, BNSF's claim of refutation was for the jury. AOB-8. The jury heard testimony from numerous fact witnesses, including one who actually affixed the stickers to the railcar, confirming the use of the asbestos warning labels. 3-SER-561–70, 690–91; 3-ER-553–58.

BNSF knew the dangers of Libby vermiculite containing asbestos.³

G.Asbestos Contaminated the Libby Railyard Through Various Mechanisms

The evidence showed BNSF's abnormally dangerous activity exceeded "transportation of vermiculite" and established that BNSF allowed toxic asbestos to accumulate in its downtown Libby railyard. 4-ER-818, 918; 2-ER-255 ("2003 report suggests there were obvious actions over the years that deposited vermiculite in the railyard containing amphibole asbestos"); 3-SER-581-82 (former railroad dump area, BN-71001, failed to achieve clearance, continued to reveal asbestos, after excavation to six-feet, two-feet deeper than EPA standard depth for leaving impacted soil in place); 3-SER-735-36 (vermiculite used in railroad buildings).

³ 3-SER-595-600; 4-ER-821 (1959 Bulletin, originating from Montana Bureau of Mines and Geology and BNSF's corporate predecessor); 3-SER-604-06; 4-SER-757 (1960 progress report; amphibole component identified as tremolite); 3-SER-604-09; 4-SER-813 (1970 Bulletin); 3-SER-587-91; 4-SER-1010 (1976 correspondence documenting railroad employee's guided tour of the Grace mine); 3-SER-585-86, 610-11, 629, 635 (1970-1972 OSHA promulgated mandatory asbestos regulations); 3-SER-630-31 (1976: NIOSH created and determined no safe level of exposure to asbestos and only banning it would be adequate to protect workers); 3-SER-625-26 (1935: BNSF knew exposure to asbestos, silica, and lead dust were the most dangerous hazards to railroad workers); 3-SER-633-34 (1937: BNSF knew asbestos was toxic dust and deadly); 3-SER-636 (1940s BNSF knew asbestos causes lung cancer); 3-SER-637 (1943: mesothelioma first reported in medical literature; 1960s well-established asbestos causes mesothelioma).

The vermiculite left-over and discarded in BNSF's railyard was not being stored or transported, and thus its long-time toxic presence in the Libby railyard cannot be deemed to be within the federal statutory definition of transportation and illustrates further why BNSF's conduct does not fall within the common carrier exception.

[. . .]

ARGUMENT

I. Montana's Common Carrier Exception Does Not Apply to the Abnormally Dangerous Activities and Conditions BNSF Maintained on the Libby Railyard (Issue 1)

BNSF's first issue asks whether Montana's common carrier exception protects BNSF from strict liability for harm caused by asbestos in and on its railyard. AOB-2. The district court appropriately concluded that the Montana Supreme Court "likely intended the common carrier exception to be construed narrowly." 1-ER-28 (Order on Mot. J. Matter Law). BNSF disagrees, arguing that the district court "improperly adopted Plaintiffs' reed-thin view of common carrier immunity." AOB-29. The scope of the common carrier exception is a state-law question of first impression and is determinative of BNSF's first issue. It is, therefore, the subject of a Motion to Certify, filed contemporaneously with this brief, and separately briefed here in response to Appellant's Opening Brief.

A. The Montana Supreme Court Already Determined That BNSF's Handling of Asbestos in Libby Is an Abnormally Dangerous Activity

In accordance with section 519 of the Restatement (Second) of Torts, “[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.” *See Matkovic v. Shell Oil Co.*, 707 P.2d 2, 4 (Mont. 1985) (adopting Restatement (Second) of Torts §§ 519 and 520).⁸

In *BNSF Railway Co. v. Eddy*, 2020 MT 59, 399 Mont. 180, 459 P.3d 857, 873, the Montana Supreme Court applied the multi-factor test of Restatement (Second) of Torts, § 520, to BNSF's activities in Libby and concluded that “BNSF's handling of asbestos . . . constitutes an abnormally dangerous activity for which BNSF is strictly liable under Restatement (Second) of Torts, § 519.”

Accordingly, on cross-motions for summary judgment, the district court determined that BNSF's handling of asbestos in Libby constituted an abnormally

⁸ The Montana Supreme Court recognizes that section 519 strict liability applies to abnormally dangerous conditions and abnormally dangerous activities. In *Covey v. Brishka*, 445 P.3d 785, 792 (2019), the Court held that “strict liability is limited to the instances of harm that made the activity *or condition* abnormally dangerous.” “The District Court did not err when it determined the Brishkas were strictly liable for any damage their pond might cause because it constituted an *abnormally dangerous condition*.” *Id.* at 794 (emphasis added).

dangerous activity for which it is strictly liable. 1-ER-139 (Order Granting in Part Pls.’ Mot. Summ. J.).

B. The Montana Supreme Court Adopted a Limited Common Carrier Exception and Remanded for Application to Facts

The *Eddy* Court then adopted a common carrier exception, which provides that the rules of strict liability for abnormally dangerous activities do not apply “if the activity is carried on in pursuance of a public duty imposed on the actor . . . as a common carrier.” *Eddy*, 459 P.3d at 874 (citing Restatement (Second) of Torts, § 521).

The *Eddy* Court held that the common carrier exception applies if “(1) the activity is carried on in pursuance of a public duty and (2) that public duty is imposed on the actor as a common carrier.” *Id.* It found BNSF immune from strict liability for “its actions of transporting vermiculite because state and federal statutes require BNSF to carry any good offered that can be shipped.” *Id.* BNSF argues that limiting the exception to statutory duties provides an “anemic version of common carrier immunity.” AOB-29. But limiting the exception is precisely what the Montana Supreme Court did when adopting section 521 into Montana law.⁹ The *Eddy* Court expressly

⁹ As Judge Royal pointed out in his concurring opinion in *Lam v. United States*, the Restatement is not state law unless a state adopts it, and then it is no longer the Restatement. 979 F.3d 665, 684 (9th Cir. 2020) (J. Royal, concurring). Significantly, the *Eddy* Court adopted section 521 “to the extent that it provides, ‘[t]he rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed on the actor . . . as a common carrier.’” *Eddy*, 459

held that “any *other activity* BNSF engaged in that was not undertaken *pursuant to its statutory duty*” and any activity it engaged in for its own purposes would not be protected from strict liability under section 521. *See Eddy*, 459 P.3d at 874–75 (emphasis added).

What the *Eddy* Court *did not decide*, however, is the scope of BNSF’s “other activities”—*i.e.*, activities not undertaken pursuant to its public or statutory duty. *See id.* at 875 (“What those ‘other activities’ may be is not an issue now before this Court, and the Asbestos Court on remand may determine which, if any, of BNSF’s ‘other activities’ were not undertaken pursuant to its statutory duty.”). Likewise, the district court here did not decide that question at the summary judgment stage. 1-ER-140. Instead, the district court, aided by evidence from both parties and the jury’s findings, made that determination at trial.

C. The District Court Instructed Jury on Abnormally Dangerous Activity and Common Carrier Immunity for Transportation of Vermiculite

When discussing the jury instructions, the district court noted:

THE COURT: All right. So here’s my struggle on the common carrier exception. The Montana Supreme Court has determined that the handling of asbestos constitutes inherently dangerous activity. That’s a matter of law.

P.3d at 874 (emphasis added).

The question is, how far does Section 521's common carrier apply? And I'm not — I haven't seen a court address who decides how far that exception applies.

1-ER-32–33.

After considering argument of counsel, the court instructed the jury, in Instruction No. 15:

... BNSF's transportation of vermiculite containing asbestos constitutes an abnormally dangerous activity. ... BNSF is immune from strict liability for the transport of vermiculite.

... BNSF is not immune from strict liability to the extent that BNSF handled asbestos in its railyard outside its statutory duty as a common carrier to transport vermiculite.

Therefore, if you determine that vermiculite containing asbestos in BNSF's Libby railyard caused Plaintiffs' injuries you must determine the amount of damages. ...

4-ER-947. And in Instruction Nos. 17 and 18, the court instructed the jury that Plaintiffs had the burden of proving, among other things, "That BNSF handled vermiculite containing asbestos in its railyard outside of its statutory duty to transport vermiculite." 4-ER-949–50.

The Special Verdict forms asked the jury:

Question 1: Did Plaintiff Walder [Wells] prove by a preponderance of the evidence that BNSF's handling of vermiculite containing asbestos outside its duties as a common carrier was a substantial factor in

bringing about the injuries of Plaintiff Walder [Wells]?

4-ER-1005 (Walder); 4-ER-1008 (Wells). The jury answered “Yes” to Question 1 for both Walder and Wells. *Id.*

D.Montana’s Common Carrier Exception Is Narrow

BNSF suggests that all activities or conditions at the Libby rail-yard fall within the common carrier exception, thus seeking an exception that would immunize common carriers from section 521 strict liability in virtually all circumstances. AOB-24 (“*everything* BNSF did to transport *and handle* Grace’s product was ‘pursuant to its statutory duty’ and immune from strict liability.”) (emphasis added). But the exception is triggered by “activity . . . carried on in pursuance of a public duty . . . as a common carrier,” not by a railroad’s bare status as a common carrier. *Eddy*, 459 P.3d at 874. If the latter sufficed, it “likely would result in the common carrier exception rendering redundant strict liability stemming from an abnormally dangerous activity when the defendant serves as a common carrier.” 1-ER-28.

“The application of § 521 to BNSF’s transportation of vermiculite must balance the need to protect individuals and communities from dangerous activities against the public policy to provide and protect the transportation of materials throughout the country as mandated by law.” 1-ER-136 (citing *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203, 1207 (E.D. Cal. May 12, 1976) (holding, under California law, that “where one intentionally engages in an ultrahazardous enterprise and thereby exposes others to risks of harm

which cannot be eliminated by the exercise of due care, fairness or abstract justice requires the precipitator of the risk to pay for resulting damages.”).

BNSF argues the district court got it wrong by construing Montana’s common carrier exception too narrowly. AOB-29. But this argument contravenes *Eddy*. There, the Montana Supreme Court concluded that the common carrier exception applies “only to actions taken pursuant to a public duty” and “only to the extent that a defendant was legally required to perform the ultrahazardous activity.” *Eddy*, 459 P.3d at 874–75 (citing *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986, 1006 (9th Cir. 2008)). The district court correctly rejected BNSF’s argument and followed *Eddy*.

E. No Public Duty Required BNSF to Maintain an Asbestos-Contaminated Railyard

As a common carrier, BNSF is required by law to provide transportation services. 49 U.S.C. § 11101(a). In considering the scope of BNSF’s public duty, the district court consulted the federal statutory definition of “transportation,” which includes “services related to [the movement of passengers or property or both by rail], including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” 49 U.S.C. § 10102(9). *See* 1-ER-134. (Order Granting in Part Pls.’ Mot. Summ. J). But, the court rejected BNSF’s argument that section 521 encompasses all aspects of a carrier’s operations, including leasing, construction, management, and facility operations. 1-ER-135.

Further, as detailed in the Statement of Facts, BNSF’s abnormally dangerous activity exceeded

“transportation of vermiculite.” The evidence at trial supported Plaintiffs’ strict liability claims that BNSF maintained its property in an abnormally dangerous condition by “failing to take measures to prevent toxic dust from collecting upon and escaping from its property.” 1-ER-127.

The district court cited evidence that “BNSF failed to adequately clean or quarantine the [asbestos-containing] material, instead allowing it to disperse in the air and around the premises.” 1-ER-49. The court found that “[n]othing under BNSF’s duty as a common carrier prevented [it] from periodically cleaning the railyard, or from improving its facilities to capture vermiculite dust for safe disposal.” 1-ER-49–50. Citing *In re East Palestine Train Derailment*, No. 4:23CV0242, 2024 U.S. Dist. LEXIS 43837, at *49–50, 2024 WL 1096064, at *11 (N.D. Ohio Mar. 13, 2024), the district court concluded BNSF’s activity of maintaining asbestos on its property in the open air, effectively “release[ing]” asbestos, falls outside the scope of the common carrier exception.

Because BNSF cannot point to any public duty requiring it to allow asbestos to accumulate for decades at the Libby railyard, this Court should affirm the district court’s judgment regarding the scope and application of Montana’s common carrier exception.

F. Evidence of BNSF’s “Other Activities” in and Around the Libby Railyard

The evidence shows the following other (non-transportation) activities that BNSF engaged in for its own purposes during the period of Plaintiffs’ exposure:

- Asbestos was allowed to accumulate on the railyard, with BNSF never controlling or cleaning it up until the EPA's Libby remediation in the 2000s:
 - Asbestos-containing materials spilled onto the soil for decades. It still needed to be removed in 2003. 2-ER-259–260.
 - EPA's 2003 Initial Pollution Report (Exhibit 1) identifies obvious acts over the years that deposited vermiculite containing amphibole asbestos in the railyard. 2-ER-255–56.
 - Visible vermiculite was found along the tracks and within the railyard, and analytical results showed asbestos levels in the soil from 2 to 5 percent. 2-ER-255; 4-ER-818.
 - The 2003 Administrative Order of Consent (between EPA and BNSF) (4-ER-931–32) establishes that the “potential harm caused by asbestos on the Site is *geographically divisible* from the potential harm caused by asbestos off the Site.” 3-SER-620–21 (emphasis added).
 - Hart testified that a former dump area for the railroad “failed to achieve clearance and was excavated to six feet.” According to Hart, “[a]chieve clearance means that after excavation, the soil sample . . . is non-detect for asbestos, so it can be considered cleared.” In this case, the sample revealed asbestos even

at six feet. 3-SER-581–82; *see also* 4-ER-918, 924.

- The vermiculite piles Walder played in as a child accumulated in the railyard next to the ball field. Walder watched her brothers play baseball and would play in the piles on the railyard. 3-SER-654–55.
- The resulting disbursement of toxic asbestos into the neighboring community:
 - Marshall and Compton testified that railyard asbestos became airborne by wind disturbances and other non-transport activities, reaching Wells’ breathing zone during a five-and-half-month period in the summer of 1978 when he lived in a mobile home very close to the railyard; and Marshall further testified that airborne asbestos from the railyard reached Walder’s breathing zones when she spent time at her best friend’s house near the railyard, running track next to the railyard during high school, and frequenting the baseball diamonds near the railyard. 3-SER-6721–72.

For decades, BNSF was responsible for and allowed asbestos that continued to accumulate in the railyard to disburse into the Libby community without any connection to BNSF’s statutory duties. As the district court concluded, BNSF maintained the Libby railyard “in such a state” for its own purposes “to earn

revenue and continue transport operations without delay.” 1-ER-50–51.

Responsibility in strict liability of Montana landowners for abnormally dangerous conditions on their property is well established. *Covey*, 445 P.3d at 790–91; *Dutton v. Rocky Mountain Phosphates*, 438 P.2d 674, 680–81 (Mont. 1968). Common carrier or not, BNSF remains strictly liable for engaging in abnormally dangerous activities and maintaining an abnormally dangerous condition on its property.

Because BNSF was not required by law to maintain asbestos on its property, the common carrier exception does not apply to such activities. Thus, BNSF remains strictly liable for the harm resulting from BNSF’s maintenance of and failure to control asbestos at the Libby railyard.

G.Cases Relied Upon by BNSF Do Not Support Application of Common Carrier Exception

BNSF’s arguments for application of the common carrier exception find no support in the case law it cites; those cases applied the exception when liability causing events occurred during transportation. For example, in *Pecan Shoppe of Springfield, Missouri, Inc. v. Tri-State Motor Transit Co.*, 573 S.W.2d 431 (Mo. App. 1978), the court applied the common carrier exception to a tractor trailer explosion that occurred *during* defendant’s *transport* of dynamite. Likewise, the court in *Pope v. Edward M. Rude Carrier Corp.*, 138 W.Va. 218, 75 S.E.2d 584, 597 (1953), applied the common carrier exception to an explosion of dynamite *while in highway transit*. And in *Town of East Troy v. Soo Line Railroad Co.*, 409 F. Supp. 326, 328–30 (E.D.

Wisc. 1976), plaintiffs' strict liability claim failed because they did not complain—in support of that claim—about the railroad's conduct subsequent to the derailment. Those cases are distinguishable from this case because the abnormally dangerous activity here—permitting asbestos to accumulate on the railyard—continued to occur separate from and long after any transportation of vermiculite. *See also Actiesselskabet Ingrid v. Cent. R.R. Co. of New Jersey*, 216 F. 72, 74 (2nd Cir. 1914) (holding that common carrier exception to strict liability applied to “any damage which may result *in the course of transportation*”) (emphasis added).

BNSF attempts to distinguish *East Palestine* on the basis that *East Palestine* involved a derailment, to which Norfolk Southern responded by detonating explosives to vent and burn toxic chemicals. 2024 WL 1096064, at *1, 3. The analogous factor, however, is that the injuries—in both *East Palestine* and *Libby*—did not occur exclusively in the course of the railroad's transportation of the hazardous materials. *Id.*, *11 (“While Norfolk Southern may have been required to accept and transport the vinyl chloride as cargo, they voluntarily undertook activities for their own purpose; namely to release and burn vinyl chloride in order to get the derailed cars out of the way to start their trains running through *East Palestine* again to earn revenue.”).

In conclusion, there are three separate ways in which an abnormally dangerous activity or condition falls outside the common carrier exception: (1) it is not “transportation” as defined by federal law; (2) it is not in pursuit to a statutory duty; or (3) it is done for defendant's own purposes. As the district court cor-

rectly determined that one or more of these tests (indeed all three) had not been satisfied, this Court should reject BNSF's first issue on appeal.

[. . .]

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Date: May 16, 2025

**APPELLEES' MOTION TO CERTIFY
DETERMINATIVE QUESTION OF LAW TO
THE MONTANA SUPREME COURT
(MAY 16, 2025)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKSON WELLS, as Personal Representative for
the Estate of Thomas E. Wells, deceased; JUDITH
HEMPHILL, as Personal Representative for the
Estate of Joyce H. Walder, deceased,

Plaintiffs-Appellees,

v.

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant-Appellant.

No. 24-4802

On Appeal from the United States District Court for
the District of Montana No. 4:21-cv-00097-BMM
Hon. Brian M. Morris, Chief District Judge

**APPELLEES' MOTION TO CERTIFY
DETERMINATIVE QUESTION OF LAW TO
THE MONTANA SUPREME COURT**

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MOTION TO CERTIFY

Appellees Jackson Wells and Judith Hemphill respectfully request that this Court certify to the Montana Supreme Court the following question of state law:

Does Montana's common carrier exception to strict liability for an abnormally dangerous activity or condition immunize BNSF from strict liability for harm caused by asbestos in or on its Libby railyard, when the prolonged presence of this toxic substance in and on its Libby railyard was not required by BNSF's statutory duties as a common carrier?

This question is determinative of the first Issue Presented in Appellant's Opening Brief. As BNSF

Railway Company (BNSF) acknowledged in its brief, this is a question of Montana law;¹ and there is no controlling appellate decision, constitutional provision, or Montana statute answering the question. *See* MONT. R. APP. P. 15(3).

ARGUMENT

I. Procedural Background

Vermiculite ore containing high concentrations of amphibole asbestos was intensively mined, processed, and shipped from Libby between 1923 and 1990. 1-ER-166 (Order Den. Mot. Summ. J.). W.R. Grace owned and operated the Libby vermiculite mine from 1963 to 1990. When Grace filed for bankruptcy protection in 2001, numerous Libby asbestos cases filed against BNSF were also delayed. 1-ER-170 (citing *In re W.R. Grace & Co.*, 475 B.R. 34 (D. Del. 2012), *aff'd*, 729 F.3d 311 (3d Cir. 2013), *and aff'd*, 729 F.3d 332 (3d Cir. 2013), *and aff'd*, 532 F. App'x 264 (3d Cir. 2013)).

By the time the cases against BNSF were finally allowed to proceed, there were hundreds of Libby asbestos cases pending in state court. This led the Montana Supreme Court, in 2017, to create the Asbestos Claims Court (“ACC”) pursuant to the Montana Asbestos Claims Court Act. *In re Asbestos Litig.*, No. AC 17-0694, 2017 WL 5949936 (Mont. Nov. 28, 2017) (citing MONT. CODE §§ 3-20-101 to-105). The Court’s order appointed Judge Amy Eddy as the Asbestos Claims Judge and consolidated approximately 540 pending Libby “asbestos-related claim” cases into

¹ *See, e.g.*, Appellant’s Br. at 30, 45.

the ACC for pre-trial purposes. *Id.*, at *1; *see also* MONT. CODE § 3-20-101 (defining asbestos-related claim). There are currently 210 Libby community exposure asbestos cases still pending against BNSF, brought by 388 plaintiffs. *See* Exhibit 1-A.

Judge Eddy selected lead cases against each defendant to enable entry of dispositive rulings applicable to all cases against that defendant. *See* Exhibit 1 (Declaration of Jinnifer Mariman). In the lead case against BNSF, *Barnes v. State of Montana*, No. AC-17-0694, No. DV-16-111 (Mont. Asbestos Claims Ct. Jan. 15, 2019), the court granted in part plaintiffs' motion for summary judgment, concluding that BNSF was strictly liable "for engaging in an abnormally dangerous activity vis-à-vis its operations in Libby, Montana." 4-ER-992-1004 (ACC Order at 13).

BNSF appealed the ACC order to the Montana Supreme Court, resulting in *BNSF Railway Co. v. Eddy*, 2020 MT 59, 399 Mont. 180, 399 Mont. 180, 459 P.3d 857. As discussed in more detail below, the unanimous Montana Supreme Court affirmed the ACC's conclusion that BNSF's "handling of asbestos" in Libby constituted an abnormally dangerous activity for which it is strictly liable, reversed in part to the extent BNSF was protected from strict liability under the common carrier exception for "transporting of vermiculite" pursuant to its statutory duty, and remanded the issue of whether the common carrier exception applied to "any *other activity* BNSF engaged in that was not undertaken pursuant to its statutory duty." *Eddy*, 459 P.3d at 873, 874-75, 877, ¶¶ 39, 46-49, 63-64 (emphasis added). The issue remanded in *Eddy*—the scope of Montana's newly-adopted common

carrier exception—is the very issue that is the subject of this Motion to Certify.²

In April 2024, the Honorable Brian Morris, United States District Judge for the District of Montana, called this case for trial before a jury. This case is the first and only Libby community exposure asbestos case to go to trial against BNSF. Since the creation of the ACC, no cases against BNSF have settled. All of the 210 other Libby community exposure asbestos cases are waiting to proceed pending the outcome of this appeal as this is the first case in which a court has determined the scope of Montana’s common carrier exception. *See* Exhibit 1 (Declaration of Jinnifer Mariman).

II. Legal Standard for Certification

When presented with a question of state law that has not been decided by the state’s highest court, and state law permits, this Court may exercise its discretion to certify the question to the state’s highest court. *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019) (en banc). In exercising that discretion, the certifying court considers the following (the *Dusek* factors): “(1) whether the question presents ‘important public policy ramifications’ yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court’s caseload; and (4) ‘the spirit of comity and federalism.’” *Glacier Bear Retreat, LLC v. Dusek*, 107 F.4th 1049, 1052-53 (9th Cir. 2024) (quoting *High Country Paving, Inc. v.*

² Due to the COVID-19 pandemic and other delays, *Barnes—the case remanded by Eddy—has* not yet gone to trial. *See* Exhibit 1 (Declaration of Jinnifer Mariman). *See* Fed. R. App. P. 27(a)(2)(B).

United Fire & Cas. Co., 14 F.4th 976, 978 (9th Cir. 2021)).

Rule 15(3) of the Montana Rules of Appellate Procedure also provides that the Montana Supreme Court “may answer a question of law certified to it by a court of the United States” if:

- (a) The answer may be determinative of an issue in pending litigation in the certifying court; and
- (b) There is no controlling appellate decision, constitutional provision, or statute of this State.

Mont. R. App. P. 15(3).

The Montana rule further states that in the absence of an agreed statement of facts, “the certifying court shall determine the relevant facts.” Mont. R. App. P. 15(6)(b).

III. Relevant Facts

The parties here were not able to agree upon a statement of facts. The facts relevant to the question and the nature of the controversy are reflected in the following excerpts from the district court’s Rule 50 orders:

This action concerns BNSF’s handling and transport of vermiculite containing asbestos in Libby, Montana. The Court conducted a jury trial in this matter from April 8, 2024, to April 22, 2024. The jury determined that BNSF’s handling of vermiculite containing asbestos outside its duties as a common carrier served as a substantial factor in

bringing about the injuries to Plaintiffs Wells and Walder. . . . The jury awarded Plaintiffs Wells and Walder \$4,000,000 each in compensatory damages, for a total of \$8,000,000.

1-ER-8 (Order Den. Renewed Mot. J. as Matter of Law).³

Plaintiffs have presented evidence that once the asbestos-containing material landed on BNSF property, BNSF failed to adequately clean or quarantine the material, instead allowing it to disperse in the air in and around the premises. Nothing under BNSF's duty as a common carrier prevented Defendant from periodically cleaning the railyard, or from improving its facilities to capture vermiculite dust for safe disposal. Defendant carried on an "abnormally dangerous activity," that is, maintaining uncontained asbestos-containing material open air on its property [and] caused Plaintiffs harm—asbestos-exposure-related disease—of the type that made the activity abnormally dangerous.

1-ER-23-24, 28; 1-ER-49-50 (Order Den. Mot. J. Matter of Law).

Defendant's activity of maintaining asbestos-containing materials on its property in the open air, effectively "release [ing]" asbestos, likewise falls outside the scope of the common carrier exception. See *[In re E. Palestine Train Derailment]*, No. 4:23CV0242,

³ *Wells v. BNSF Ry. Co.*, 740 F.Supp.3d 1047, 1052 (D. Mont. 2024).

2024 U.S. Dist. LEXIS 43837,] at *50 [(N.D. Ohio Mar. 13, 2024)]. Defendant maintained the premises in such a state “for [Defendant’s] own purposes” to earn revenue and continue transport operations without delay and was not bound by public duty to act in such a manner. *Id.* at *49-50; [*In re*] *Hanford Nuclear Rsrv. [Litigation*, 534 F.3d 986,] 1006 [9th Cir. 2008)]; *see Eddy* at 875.

1-ER-50-51.

Plaintiffs presented evidence at trial that the Libby Railyard contained a dangerous concentration of asbestos and asbestos-contaminated vermiculite that maintained the ability to escape from the Libby Railyard and travel into the Libby, Montana community. Plaintiffs further presented evidence that the Plaintiffs’ deaths were caused by mesothelioma, and that the Plaintiffs’ lungs contained Libby amphibole asbestos fibers, an asbestos fiber unique to Libby, Montana.

1-ER-28.

Furthermore, the abnormally dangerous activity and condition at issue here was described succinctly by the Montana Supreme Court in *BNSF Railway Co. v. Eddy*, relied upon by the district court:

In response to concerns regarding possible asbestos exposure in Libby, the EPA began investigating in 2000 and placed the site on the Superfund National Priorities List in 2002. In 2003, it released an Initial Pollution Report which revealed “[a]sbestos contaminated materials were hauled and shipped

through the [BNSF] railyard, and spilled into the soil for decades,” and that “asbestos . . . is present in soil, raw ore, ore-concentrate and other soil-like materials at various locations in and around the community including the BNSF railyard.” Likewise, the report indicated that “analytical results have shown asbestos levels in soil from 2-5%” in the railyard and that “[b]aseline monitoring along the track conducted by BNSF has found the highest concentrations measured during the sweeping ranges from 7 to 14 f/cc in air. A total of 22 surface soil samples collected along the railroad tracks and its railyard ranged from a trace to less than 1% fibrous amphibole asbestos by weight. In addition, visible unexpanded vermiculite remained at Tracks #1, #2 and #3.” These statistics were provided by tests done by BNSF at least a decade after the vermiculite mining operations in Libby had ceased, and after BNSF had attempted to excavate and remediate the property.

. . .

The evidence BNSF presents does not dispute there were large amounts of asbestos present in its railyard and around its tracks. Central to both parties’ arguments is the EPA’s 2003 Initial Pollution Report. BNSF correctly points out that the document provides, “[a] total of 22 surface soil samples collected along the railroad tracks and its railyard ranged from a trace to less than 1% fibrous amphibole asbestos by weight.” However,

reviewing the document in its entirety, it also establishes additional facts BNSF does not dispute, including that the railyard testing revealed asbestos soil levels of 2-5% and extensive areas of visible vermiculite. Therefore, by not actually disputing *the entirety* of the EPA's report, including the several statements that ample asbestos remained in the Libby Railyard, BNSF did not meet its burden to defeat summary judgment. Similarly, BNSF references one part of a 2001 EPA report on personal air samples, and points out that those results do not exceed the OSHA limit. However, upon examining the entirety of the test results in that report, it is clear that plenty of the samples taken did exceed the OSHA limit. Likewise, the EPA's 2003 Initial Pollution Report indicates airborne asbestos levels at 7-14 f/cc, far above the OSHA limit. Again, BNSF does not dispute these numbers. Finally, BNSF's expert, relying on maps that indicate asbestos was present in the soil around BNSF's property, maintained only that the asbestos in the soil "is not *clustered* around the BNSF rail yard or the BNSF tracks," but that, nonetheless, "detections of [asbestos] are widespread throughout the area. . . ." (Emphasis added.) Thus, although BNSF cherry picks the record to cite to isolated favorable test results, it is beyond dispute that extensive asbestos existed, at high levels, on BNSF's properties.

IV. This Court Should Certify the Question

Given the relevant facts in this case, each of the *Dusek* factors considered by this Court in certifying a question of law to a state court, and both elements of the Montana rule governing certification, weigh in favor of certification.

A. The Question Presents Important, Unresolved, Public Policy Ramifications (First *Dusek* Factor)

1. The Montana Supreme Court left the scope of the common carrier exception unresolved.

After applying the multi-factor test of Restatement (Second) of Torts, § 520, to BNSF's activities in Libby, the Montana Supreme Court in *Eddy* concluded that "BNSF's handling of asbestos . . . constitutes an abnormally dangerous activity for which BNSF is strictly liable under Restatement (Second) of Torts, § 519." 459 P.3d at 873, ¶ 39.

The *Eddy* Court then discussed and adopted Montana's common carrier exception, which provides that the rules of strict liability for abnormally dangerous activities do not apply "if the activity is carried on in pursuance of a public duty imposed on the actor . . . as a common carrier." *Id.*, 459 P.3d at 874, ¶ 46 (citing Restatement (Second) of Torts, § 521).

The *Eddy* Court determined that BNSF is entitled to the common carrier exception for strict liability imposed as a result of its "transporting of vermiculite," which it was required to do by law. *See id.* at 874, ¶ 47. But in connection with its adoption of a common carrier

exception into Montana law, the *Eddy* Court also held that “BNSF’s activities other than transportation of vermiculite are not protected by the common carrier exception.” *See id.* at 75, ¶ 49. This included the direction that “any *other activity* BNSF engaged in that was not undertaken pursuant to its statutory duty,” such as activities undertaken for its own purposes, were not protected from strict liability by the common carrier exception. *See id.* at 874-75, ¶ 49 (emphasis added).

What the *Eddy* Court did not decide, however, is the scope of BNSF’s “other activities”—*i.e.*, activities not undertaken pursuant to its statutory duty. *See id.* at 875, ¶ 49 (“What those ‘other activities’ may be is not an issue now before this Court, and the Asbestos Court on remand may determine which, if any, of BNSF’s ‘other activities’ were not undertaken pursuant to its statutory duty.”).

In this case, the district court, aided by the jury’s findings, made that very determination. When discussing the jury instructions, the district court noted:

THE COURT: All right. So here’s my struggle on the common carrier exception. The Montana Supreme Court has determined that the handling of asbestos constitutes inherently dangerous activity. That’s a matter of law.

The question is, how far does Section 521’s common carrier apply? And I’m not — I haven’t seen a court address who decides how far that exception applies.

After considering argument of counsel, the court instructed the jury, in Instruction No. 15:

BNSF transported vermiculite containing asbestos. BNSF's transportation of vermiculite containing asbestos constitutes an abnormally dangerous activity. BNSF transported vermiculite containing asbestos in pursuit of its public duty as a common carrier. BNSF is immune from strict liability for the transport of vermiculite.

BNSF handled vermiculite containing asbestos fibers in its Libby railyard. BNSF is not immune from strict liability to the extent that BNSF handled asbestos in its railyard outside its statutory duty as a common carrier to transport vermiculite.

Therefore, if you determine that vermiculite containing asbestos in BNSF's Libby railyard caused Plaintiffs' injuries you must determine the amount of damages that will reasonably and fairly compensate Plaintiffs for the harm caused by BNSF's abnormally dangerous railyard.

1-ER-31. And in Instruction Nos. 17 and 18, the court instructed the jury that the Plaintiffs had the burden of proving, among other things, "That BNSF handled vermiculite containing asbestos in its railyard outside of its statutory duty to transport vermiculite." 4-ER-949-50.

The Special Verdict forms then asked the jury:

Question 1: Did Plaintiff Walder [Wells] prove by a preponderance of the evidence

that BNSF's handling of vermiculite containing asbestos outside its duties as a common carrier was a substantial factor in bringing about the injuries of Plaintiff Walder [Wells]?

4-ER-1005 (Walder); 4-ER-1008 (Wells). The jury answered "Yes" to Question 1 for both Walder and Wells. *Id.*

The district court ordered the clerk to enter judgment in accordance with the jury's verdicts. 1-ER-3. In denying BNSF's renewed motion for judgment as a matter of law, District Judge Brian Morris, a former Montana Supreme Court justice, reasoned:

BNSF's common carrier argument, similar to its argument presented in pretrial proceedings, likely would result in the common carrier exception rendering redundant strict liability stemming from an abnormally dangerous activity when the defendant serves as a common carrier. (*See* Doc. 222 at 18.) The Court remains mindful that the Montana Supreme Court, in adopting the common carrier exception, *likely intended the common carrier exception to be construed narrowly. See Eddy*, 459 P.3d at 875 ("[t]hus, BNSF's activities other than transportation of vermiculite are not protected by the common carrier exception.") The Court declines to disturb the jury's verdict based on this rationale.

1-ER-28 (emphasis added).

BNSF argues on appeal—as it did in the court below—that, when *anticipating* what the Montana Supreme Court is likely to do, the district court got it

wrong by construing Montana's common carrier exception too narrowly. *See* Appellant's Br. at 29. This unresolved question regarding the scope of Montana's common carrier exception is best left to the Montana Supreme Court.

2. The scope of Montana's common carrier exception, as applied to BNSF's activities at the Libby railyard, presents important public policy ramifications.

The question is a demonstrably important issue to all citizens of Montana, not just to the Wells and Walder families. Indeed, claims arising out of asbestos-related disease resulting from asbestos-containing vermiculite have already played a significant role in reshaping the Montana judiciary. The sheer number of cases arising from exposure to asbestos-containing vermiculite in and around Libby caused the Montana Legislature to enact the Asbestos Claims Court Act and the Montana Supreme Court to establish the Asbestos Claims Court. *See* MONT. CODE §§ 3-20-101 to-105; *In re Asbestos Litig.*, No. AC 17-0694, 2017 WL 5949936, at *1 (Mont. Nov. 28, 2017).

Nearly all of the asbestos-related claim cases currently pending in the ACC are Libby community exposure asbestos cases against BNSF-210 cases, comprising 388 individual plaintiffs. *See* Exhibit 1-A. Were this Court to proceed to make an *Erie*⁴ guess regarding the scope of the common carrier exception under Montana law, and adopt BNSF's argument that the common carrier exception should be construed

⁴ *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

broadly, its opinion would be merely advisory in the hundreds of Libby community exposure asbestos cases pending in Montana state courts. “Federal courts and other state courts present binding authority for [the Montana court] only ‘to the degree that the reasoning of the decision appears compelling.’” *Davis v. State*, 344 Mont. 300, 187 P.3d 654, 657 (2008) (quoting *In re Sinclair*, 197 Mont. 29, 32, 640 P.2d 918, 920 (1982)); see also *Arizonans for Official Eng. v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (rejecting as “remarkable” the idea that a state court must follow the precedent of lower federal courts).

Hundreds of other plaintiffs will be impacted by the answer to the certified question, *i.e.*, BNSF’s first issue on appeal. Thus, the “extraordinary complexity and costs of these cases” will be substantially reduced if the question is initially and definitively answered by the Montana Supreme Court now, directly mitigating “the enormous detrimental impact on the resources of Montana district courts” that necessitated creation of the Asbestos Claims Court in the first place. See *In re Asbestos Litig.*, 2017 WL 5949936, at *1. Every Montanan will benefit from the resulting efficiency.

As the question “presents important public policy ramifications yet unresolved by the state court,” the first factor strongly favors certification. See *Dusek*, 107 F.4th at 1052.

B. The Issue Is New, Substantial, and of Broad Application (Second Dusek Factor)

These same considerations favor a similar conclusion for the second factor. For instance, the scope of Montana’s common carrier exception to strict liability is

not just new in the sense that it remains unanswered in Montana—it is also ripe for resolution. Five years ago, Montana’s Supreme Court first adopted a common carrier exception to strict liability and concluded that it applied to BNSF’s “transporting of vermiculite, which it was required to do by law.” *Eddy*, 459 P.3d at 874, ¶ 47. But the *Eddy* Court also concluded that “BNSF’s activities other than transportation of vermiculite are not protected by the common carrier exception.” *Id.* at 875, ¶ 49. The present case has become the first (and so far, only) Libby community exposure asbestos case to be tried against BNSF. In other words, this is the Montana Supreme Court’s first opportunity to address on a full, factually-developed record, the important question it left unanswered in *Eddy*. *Dusek*’s second factor thus supports certification.

C.Montana’s Docket Favors Certification (Third *Dusek* Factor)

Unlike the California Supreme Court’s “burgeoning caseload” this Court considered in *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003), the Montana Judicial Branch reports that, for the fourth quarter of 2024, 83% of direct appeals and 96% of original proceedings had been pending in the Montana Supreme Court for less than 180 days.⁵ Furthermore, the five-year average of case filings in the Montana Supreme Court (704 filings per year from 2016 to 2020) represented a 13% *decrease* from the previous five-year period. The average for the next four years

⁵ See Montana Supreme Court Case Processing Measures 2024, <https://courts.mt.gov/external/supreme/measures/2024/4th.pdf>.

(2021 to 2024), was up slightly to 726 per year.⁶ In any event, the decision to certify lies solely within the discretion of the Montana Supreme Court, and as this Court recognized in *Kremen*, it is not the certifying court's role to pass judgment in advance on the state court's priorities. *See id.* Thus, this factor points toward certification as well.

Consideration of Montana's overall docket from another perspective also favors certification. This is hardly the only case where the scope of Montana's common carrier exception will be in issue. Specifically here, absent certification, the extent of BNSF's strict liability vis-à-vis its "other activities" in and around Libby is subject to litigation in multiple separate ACC cases until the Montana Supreme Court can clarify the scope of the common carrier exception in a future state-court appeal. As noted above, there are 210 other Libby community exposure asbestos cases pending against BNSF in the ACC. *See* Exhibit 1-A. Since the creation of the ACC, no cases against BNSF have settled. All of the 210 other cases are waiting to proceed pending the outcome of this case. Indeed, BNSF's Opening Brief in this appeal describes this case as "a bellwether for the many pending and future lawsuits planned against BNSF." *See* Appellant's Br. at 17.

Because a controlling and timely resolution of the state law issue in this case would broadly impact a meaningful share of Montana's civil docket, at present and moving forward, this Court should give the

⁶ *See* Montana Historic Case Load Statistics 2024, <https://courts.mt.gov/external/clerk/stats/2024/historic24.pdf>.

Montana Supreme Court an opportunity to provide a definitive answer.

D. Certification Furthers the Spirit of Comity and Federalism (Fourth Dusek Factor)

This Court considers “the spirit of comity and federalism” when deciding whether to certify a question. *Dusek*, 107 F.4th at 1053; *see also* Mont. R. App. P. 15(7).

Although this Court is quite capable of resolving questions of state law—even those involving difficult legal issues—certification “strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to rule on an undecided or unclear issue.” *Kremen*, 325 F.3d at 1037, n.1 (quoting Jerome I. Braun, *A Certification Rule for California*, 36 Santa Clara L. Rev. 935, 940 (1996)).

Ultimately, “[c]ertification saves time, energy, and resources and helps build a cooperative judicial federalism[.]” *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999) (quoting *Arizonans for Official English*, 520 U.S. at 46); *see also* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1085, 1086 (9th Cir. 2002) (acknowledging this Court’s “obligation to consider whether novel state-law questions should be certified”).

The scope of Montana’s common carrier exception to strict liability is a “significant” issue with “important public policy ramifications” that has not yet been presented to or resolved by the Montana Supreme Court. *See Munson v. Del Taco, Inc.*, 522 F.3d 997, 1002-03 (9th Cir. 2008) (citing *Kremen*, 325 F.3d at

1037). Accordingly, it is most appropriate for the Montana Supreme Court to definitively provide the answer in the first instance.

E. The Answer Will Be Determinative of an Issue in this Case (First Element of Rule 15)

In addition to the *Dusek* factors, the Montana Supreme Court considers whether its answer “may be determinative of an issue in pending litigation in the certifying court.” *See* MONT. R. APP. P. 15(3)(a). This consideration favors certification too.

The first issue BNSF presents in its appeal asks whether Montana’s common carrier exception protects BNSF from strict liability for harm caused by asbestos in and on its railyard. *See* Appellant’s Br. at 2. The district court concluded that the *Eddy* Court “likely intended the common carrier exception to be construed narrowly.” 1-ER-28. BNSF disagrees, arguing on appeal that the district court “improperly adopted Plaintiffs’ reed-thin view of common carrier immunity.” Appellant’s Br. at 29. The scope of the common carrier exception is the question—with a factual record developed in a full trial on the merits—that is ripe for certification to and decision by the Montana Supreme Court.

F. There Is No Controlling Appellate Decision, Constitutional Provision, or State Statute in Montana (Second Element of Rule 15)

Finally, as discussed above, the question presented by BNSF’s first issue on appeal—*i.e.*, What is the scope of Montana’s newly adopted common carrier exception?—has not previously been answered by a controlling Montana appellate decision, Montana con-

stitutional provision, or Montana statute. Thus, the second element of the Montana certification rule is satisfied. *See* Mont. R. App. P. 15(3)(b).

CONCLUSION

Certifying this question to the Montana Supreme Court advances both the resolution of this particular litigation and all the other Libby community exposure asbestos cases currently pending against BNSF in the Montana Asbestos Claims Court.

Accordingly, this Court should certify the following question to the Montana Supreme Court:

Does Montana's common carrier exception to strict liability for an abnormally dangerous activity or condition immunize BNSF from strict liability for harm caused by asbestos in or on its Libby railyard, when the prolonged presence of this toxic substance in and on its Libby railyard was not required by BNSF's statutory duties as a common carrier?

Date: May 16, 2025

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Exhibit 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKSON WELLS, as Personal Representative for
the Estate of Thomas E. Wells, deceased; JUDITH
HEMPHILL, as Personal Representative for the
Estate of Joyce H. Walder, deceased,

Plaintiffs-Appellees,

v.

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant-Appellant.

No. 24-4802

On Appeal from the United States District Court for
the District of Montana No. 4:21-cv-00097-BMM
Hon. Brian M. Morris, Chief District Judge

**DECLARATION OF JINNIFER MARIMAN
IN SUPPORT OF APPELLEES' MOTION TO
CERTIFY DETERMINATIVE QUESTION OF
LAW TO THE MONTANA SUPREME COURT**

I, Jinnifer Jeresek Mariman, counsel for Appellees,
declare as follows:

1. I submit this declaration in support of *Appellees' Motion to Certify Determinative Question of Law to the Montana Supreme Court*. I have knowledge of the

facts set forth herein, and if called to testify as a witness thereto, could and would competently do so under oath.

2. Currently in the Montana Asbestos Claims Court (“ACC”), my firm represents 388 individual clients in 210 Libby community exposure asbestos cases pending against Appellant BNSF Railway Company (“BNSF”). Attached hereto as Exhibit 1-A is a true and correct copy of a list of those cases and corresponding number of plaintiffs in each case.

3. In 2018, the ACC Judge, Amy Eddy, selected lead/test cases against each defendant to enable entry of dispositive rulings that would be applicable to all cases against that defendant. The lead case in the ACC against BNSF is *Barnes v. State of Montana*, No. AC-17-0694, No. DV-16-111 (Mont. Asbestos Claims Ct. Jan. 15, 2019). *See* 4-ER-992-1004. BNSF appealed the ACC’s summary judgment order in *Barnes* to the Montana Supreme Court, resulting in *BNSF Railway Co. v. Eddy*, 2020 MT 59, 399 Mont. 180, 459 P.3d 857 (Mont. 2020). Due to the COVID-19 pandemic and other delays, *Barnes—the* case remanded by *Eddy—has* not yet gone to trial.

4. This case is the first and only Libby community exposure asbestos case against BNSF to go to trial.

5. Since the creation of the ACC, none of my clients’ cases against BNSF have been settled.

6. All of my firm’s 210 cases currently pending against BNSF are waiting to proceed pending the outcome of the appeal in this case as this is the first case in which a court has determined the scope of Montana’s common carrier exception.

7. Nearly all of the asbestos-related cases currently pending in the ACC are Libby community exposure cases against BNSF.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this 16th day of May 2025.

/s/ Jinnifer Jeresek Mariman

Counsel for Plaintiffs-Appellees

Exhibit 1-A

**In the Asbestos Claims
Court of the State of Montana
Montana 23rd Judicial District Court**

Number of Active RR Plaintiffs in each case = Count
--

Cause Number	Count	Cause Number	Count
DV-57-1998-117-AE	1	DV-57-2003-424-AE	1
DV-57-2003-642-AE	2	DV-57-2004-116-AE	1
DV-57-2009-111-AE	2	DV-57-2011-036-AE	1
DV-57-2013-073-AE	1	DV-57-2013-251-AE	1
DV-57-2013-681-AE	1	DV-57-2013-753-AE	2
DV-57-2014-280-AE	1	DV-57-2014-293-AE	1
DV-57-2014-294-AE	4	DV-57-2014-365-AE	1
DV-57-2014-366-AE	4	DV-57-2014-408-AE	2
DV-57-2014-409-AE	4	DV-57-2014-519-AE	3

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Cause Number	Count	Cause Number	Count
DV-57-2014-520-AE	2	DV-57-2014-521-AE	4
DV-57-2014-586-AE	2	DV-57-2014-597-AE	2
DV-57-2014-663-AE	1	DV-57-2014-712-AE	3
DV-57-2014-768-AE	2	DV-57-2014-919-AE	2
DV-57-2014-954-AE	1	DV-57-2014-956-AE	1
DV-57-2014-957-AE	1	DV-57-2015-1007-AE	1
DV-57-2015-1008-AE	1	DV-57-2015-1024-AE	1
DV-57-2015-113-AE	1	DV-57-2015-156-AE	2
DV-57-2015-223-AE	1	DV-57-2015-335-AE	2
DV-57-2015-406-AE	2	DV-57-2015-428-AE	1
DV-57-2015-432-AE	1	DV-57-2015-469-AE	2
DV-57-2015-472-AE	1	DV-57-2015-479-AE	1

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Cause Number	Count	Cause Number	Count
DV-57-2015-480-AE	1	DV-57-2015-513-AE	2
DV-57-2015-607-AE	2	DV-57-2015-633-AE	1
DV-57-2015-706-AE	1	DV-57-2015-737-AE	1
DV-57-2015-771-AE	1	DV-57-2015-773-AE	1
DV-57-2015-774-AE	1	DV-57-2015-789-AE	2
DV-57-2015-790-AE	1	DV-57-2015-799-AE	1
DV-57-2015-892-AE	1	DV-57-2015-938-AE	1
DV-57-2016-111-AE	3	DV-57-2016-112-AE	1
DV-57-2016-132-AE	1	DV-57-2016-139-AE	1
DV-57-2016-143-AE	1	DV-57-2016-162-AE	1
DV-57-2016-176-AE	1	DV-57-2016-193-AE	1
DV-57-2016-195-AE	1	DV-57-2016-262-AE	1

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Cause Number	Count	Cause Number	Count
DV-57-2016-264-AE	1	DV-57-2016-335-AE	2
DV-57-2016-337-AE	3	DV-57-2016-339-AE	1
DV-57-2016-342-AE	1	DV-57-2016-378-AE	1
DV-57-2016-379-AE	1	DV-57-2016-380-AE	1
DV-57-2016-381-AE	1	DV-57-2016-383-AE	1
DV-57-2016-398-AE	1	DV-57-2016-411-AE	1
DV-57-2016-417-AE	1	DV-57-2016-420-AE	1
DV-57-2016-427-AE	1	DV-57-2016-432-AE	1
DV-57-2016-518-AE	1	DV-57-2016-545-AE	1
DV-57-2016-549-AE	1	DV-57-2016-550-AE	1
DV-57-2016-565-AE	1	DV-57-2016-571-AE	1
DV-57-2016-602-AE	1	DV-57-2016-616-AE	1

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Cause Number	Count	Cause Number	Count
DV-57-2016-691-AE	1	DV-57-2016-784-AE	1
DV-57-2016-785-AE	59	DV-57-2016-862-AE	1
DV-57-2016-892-AE	1	DV-57-2016-968-AE	2
DV-57-2016-971-AE	1	DV-57-2017-093-AE	1
DV-57-2017-108-AE	1	DV-57-2017-173-AE	1
DV-57-2017-176-AE	1	DV-57-2017-177-AE	1
DV-57-2017-204-AE	1	DV-57-2017-205-AE	2
DV-57-2017-206-AE	1	DV-57-2017-207-AE	1
DV-57-2017-213-AE	1	DV-57-2017-259-AE	1
DV-57-2017-260-AE	1	DV-57-2017-261-AE	1
DV-57-2017-333-AE	2	DV-57-2017-335-AE	1
DV-57-2017-336-AE	1	DV-57-2017-337-AE	1

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Cause Number	Count	Cause Number	Count
DV-57-2017-356-AE	1	DV-57-2017-436-AE	3
DV-57-2017-461-AE	2	DV-57-2017-463-AE	1
DV-57-2017-465-AE	1	DV-57-2017-486-AE	1
DV-57-2017-487-AE	1	DV-57-2017-604-AE	1
DV-57-2017-607-AE	1	DV-57-2017-634-AE	1
DV-57-2017-647-AE	1	DV-57-2017-731-AE	2
DV-57-2017-742-AE	2	DV-57-2017-747-AE	1
DV-57-2017-757-AE	3	DV-57-2018-053-AE	1
DV-57-2018-054-AE	1	DV-57-2018-062-AE	1
DV-57-2018-077-AE	1	DV-57-2018-078-AE	1
DV-57-2018-105-AE	1	DV-57-2018-126-AE	1
DV-57-2018-143-AE	1	DV-57-2018-156-AE	1

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Cause Number	Count	Cause Number	Count
DV-57-2018-158-AE	1	DV-57-2018-184-AE	1
DV-57-2018-244-AE	1	DV-57-2018-245-AE	1
DV-57-2018-488-AE	2	DV-57-2018-645-AE	1
DV-57-2018-646-AE	1	DV-57-2019-018-AE	1
DV-57-2019-021-AE	3	DV-57-2019-084-AE	1
DV-57-2019-085-AE	3	DV-57-2019-087-AE	1
DV-57-2019-089-AE	1	DV-57-2019-205-AE	1
DV-57-2019-271-AE	4	DV-57-2019-273-AE	1
DV-57-2019-275-AE	1	DV-57-2019-324-AE	2
DV-57-2019-325-AE	1	DV-57-2019-482-AE	5
DV-57-2019-483-AE	2	DV-57-2019-584-AE	1
DV-57-2019-659-AE	4	DV-57-2019-747-AE	1

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Cause Number	Count	Cause Number	Count
DV-57-2019-748-AE	1	DV-57-2019-758-AE	1
DV-57-2019-777-AE	1	DV-57-2020-034-AE	2
DV-57-2020-092-AE	4	DV-57-2020-206-AE	1
DV-57-2020-335-AE	2	DV-57-2020-366-AE	1
DV-57-2020-367-AE	2	DV-57-2020-369-AE	6
DV-57-2020-371-AE	2	DV-57-2020-374-AE	2
DV-57-2020-375-AE	1	DV-57-2020-380-AE	2
DV-57-2021-004-AE	1	DV-57-2021-007-AE	5
DV-57-2021-008-AE	2	DV-57-2021-011-AE	2
DV-57-2021-020-AE	1	DV-57-2021-023-AE	1
DV-57-2021-025-AE	1	DV-57-2021-026-AE	1
DV-57-2022-029-AE	1	DV-57-2022-030-AE	1

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Cause Number	Count	Cause Number	Count
DV-57-2022-032-AE	1	DV-57-2022-033-AE	1
DV-57-2022-034-AE	1	DV-57-2022-035-AE	1
DV-57-2022-036-AE	2	DV-57-2022-039-AE	2
DV-57-2022-043-AE	2	DV-57-2022-046-AE	2
DV-57-2022-047-AE	1	DV-57-2022-049-AE	2
DV-57-2022-050-AE	3	DV-57-2023-0001-AE	3
DV-57-2023-005-AE	2	DV-57-2023-006-AE	1
DV-57-2023-007-AE	1	DV-57-2023-012-AE	1
DV-57-2024-0001-AE	2	DV-57-2024-0007-AE	24
DV-57-2024-0010-AE	1	DV-57-2024-002-AE	1
DV-57-2024-003-AE	1	DV-57-2024-005-AE	2
DV-57-2024-006-AE	1	DV-57-2024-010-AE	2
Total cases: 212		Total plaintiffs: 388	

**APPELLEES' PETITION FOR
REHEARING EN BANC
(MARCH 10, 2026)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKSON WELLS, as Personal Representative for
the Estate of Thomas E. Wells, deceased; JUDITH
HEMPHILL, as Personal Representative for the
Estate of Joyce H. Walder, deceased,

Plaintiffs-Appellees,

v.

BNSF RAILWAY COMPANY,
a Delaware corporation,

Defendant-Appellant.

No. 24-4802

On Appeal from the United States District Court for
the District of Montana No. 4:21-cv-00097-BMM
Hon. Brian M. Morris, Chief District Judge

**APPELLEES' PETITION FOR
REHEARING EN BANC**

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PETITION STATEMENT

Pursuant to Fed. R. App. 40(b)(2)(D), Appellees Jackson Wells and Judith Hemphill respectfully request that this Court rehear this matter *en banc* because this proceeding involves the following questions of exceptional importance:¹

1. This case involves BNSF’s responsibility for its role in the asbestos contamination of the federally declared superfund community of Libby, Montana. *Wells v. BNSF Ry. Co.*, ___ F.4th ___, No. 24-4802 (Ninth Cir. Feb. 24, 2026) (“Opinion”) attached hereto as Exhibit 1.

2. Critical here, and the basis for this Petition, is this Court’s adoption of its broad “but for” scope of the untested Montana common carrier exception on a case of first impression in Montana, while denying Appellees’ Petition to Certify this Montana-specific issue to the Montana Supreme Court.

¹ Rehearing *en banc* is warranted where a case presents “a question of exceptional importance.” Fed. R. App. P. 40(b)(2)(D). 9th Cir. R. 40-1.

3. In *BNSF Ry. Co. v. Eddy*, 2020 MT 59, 459 P.3d 857, for the first time in Montana, the Montana Supreme Court found BNSF strictly liable for its “handling of asbestos.” 459 P.3d at 873. The *Eddy* Court then adopted also for the first time a Montana common carrier exception to strict liability for BNSF’s “transporting of vermiculite,” noting the exception did not protect “activities other than transportation of vermiculite” and activities for BNSF’s “own purposes.” *Id.* at 874. *Eddy* was remanded but has not yet been tried. *Id.*

4. This case is the first, and only, Libby, Montana community asbestos exposure case against BNSF to be tried since *Eddy*. Following a 12-day trial, a unanimous 7-person Montana Federal Court jury answered “YES” to the following questions posed for each Plaintiff:

Did Plaintiff[s] prove by a preponderance of the evidence that BNSF’s handling of vermiculite containing asbestos outside its duties as a common carrier was a substantial factor in bringing about the injuries of Plaintiff[s].

4-ER-1005-7 (Walder); 4-ER-1008-10 (Wells). As such, the jury found that BNSF handled vermiculite “outside its duties as a common carrier” and entered verdicts in favor of Plaintiffs. *Id.*

5. Montana Federal District Court Chief Judge Brian Morris (formerly a Montana Supreme Court Justice) confirmed post-trial that the common carrier exception did not apply to BNSF’s abnormally dangerous activity of “maintaining uncontained asbestos-containing material open air on its property.”

1-ER-50. The District Court rejected BNSF's "expansive interpretation" of the common carrier exception, namely that BNSF's operation of the Libby Railyard proves "necessary and inseparable from its public duty as a common carrier" stating that "approach would render [Restatement (Second) of Torts §] 519-520 redundant" and "no room would remain to impose strict liability . . . if 521 were read to encompass all aspects of a carrier's operations" 1-ER-26-27. The Court "remain[ed] mindful that the Montana Supreme Court, in adopting the common carrier exception, likely intended the common carrier exception to be construed narrowly." 1-ER-28. Judge Morris further held that BNSF maintained its railyard in that toxic condition for decades for its "own purposes to earn revenue and continue transport operations without delay[.]" 1-ER-50-51, *accord.* 1-ER-11.

6. On Appeal, this Court, in a case of first impression of Montana law, adopted a broad "but for" scope of the Montana common carrier exception, namely that asbestos-laden vermiculite would not be in BNSF's railyard but for the fact that it had been in transport at some point in time. Op. at 13-14, 19. This "but-for" rule ignores the fact the vermiculite that nearly completely covered BNSF's downtown Libby railyard was not in transport and had not been in transport for decades.

7. This Court additionally rejected Judge Morris' finding that BNSF refused to clean-up its railyard for its "own purposes," claiming there was no evidence "BNSF aimed to save money by not cleaning its railyard." Op. at 16. In doing so, this Court focused on money but ignored the massive cleanup effort BNSF undertook solely at the behest of the EPA, including

removal of 12,860 tons of soil, 28,182 linear feet of track, and 8,000 rail ties. 4-ER-923-24. That massive EPA mandated cleanup supported Judge Morris's second and non-monetary bases for finding BNSF had maintained its railyard in that toxic condition for its "own purposes" (*i.e.* "continue transport operations without delay").

8. This Court reversed the unanimous Montana Federal Court jury, the Montana Federal Court Chief Judge Brian Morris, and the pre-trial rulings of another Montana Federal Court judge Dana L. Christensen (*Gallegos v. BNSF*, CV-22-68-M-DLC (D. Mont. Nov. 16, 2023)) who separately considered and adopted Judge Morris's rationale. Similarly, two Montana Asbestos Claims Court ("ACC") judges, former lead ACC Judge Amy Eddy and current lead ACC Judge Matt Cuffe, found if similar evidence were admitted in their analogous Montana State Court cases, Judge Morris's rationale on the common carrier issue "will likely be persuasive." *Funk v. BNSF Railway, Co.*, No. DV-23-005 (Mont. Asbestos Claims Ct. June 10, 2024); *accord.* 4-ER-992-1004 (*Barnes v. State of Montana*, No. AC-17-0694, No. DV-16-111 (Mont. Asbestos Claims Ct. Aug. 8, 2024)).

9. There are 210 other Libby community asbestos exposure cases (with 388 Plaintiffs) that are pending against BNSF in the Montana ACC whose resolution still depends upon a binding ruling from the Montana Supreme Court on this issue. Thus, this Court is not "burdening" or "outsourcing work to" the Montana Supreme Court by certifying this critical undecided Montana law issue. Op. at 18.

ARGUMENT

I. Factual Background

BNSF's active vermiculite operations in Libby, Montana, began in the 1920s and continued until W.R. Grace's vermiculite operations ceased in 1990. 3-SER-561; 2-ER-250. During that time, nearly 10 billion pounds of vermiculite containing asbestos moved to and through BNSF's downtown Libby railyard. 3-SER-570-71; 4-SER-970, 1020.

The Libby railyard was located directly adjacent to downtown Libby, where Plaintiffs resided and recreated. 2-ER-254-55, 3-SER-591-593, 696-98, 702-706, 709-10, 714-15, 723; 4-ER-930. The Libby railyard was extensive, spanning the entire north end of downtown Libby, surrounded by ballfields, parks, businesses, and residences:

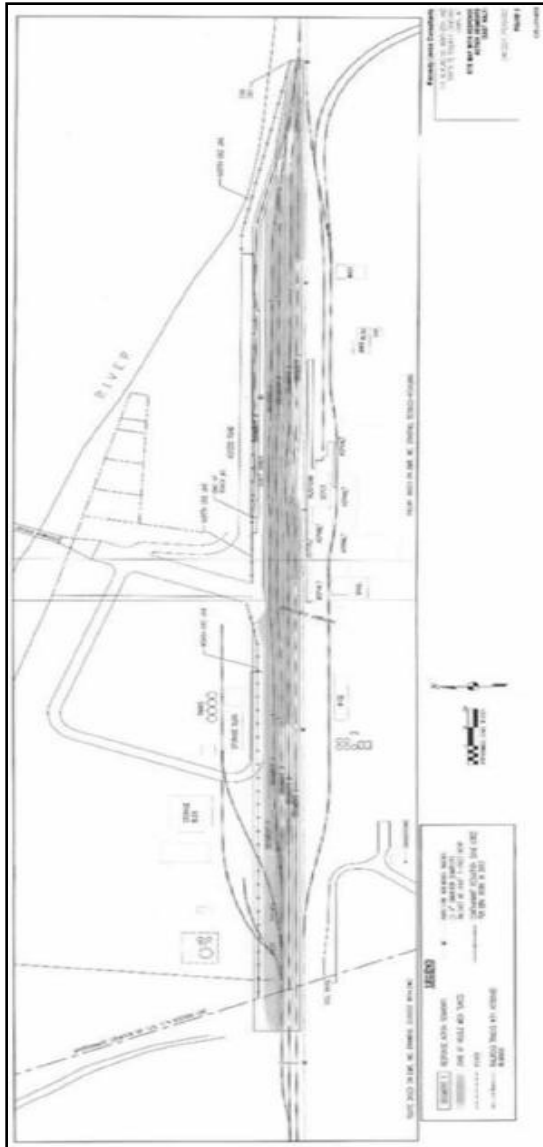


3-ER-688; 4-SER-1009 (photo 4/25/77, red outline of railyard added).

When EPA began remediation efforts in 2001—more than a decade after the last shipment of vermiculite left the Libby railyard—substantial asbestos contamination and visible vermiculite was identified

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throughout BNSF's railyard, both at the surface and reaching depths exceeding four to six feet in some locations. *See e.g.*, 4-ER-818-19. Ten years later, and almost 20 years after BNSF last transported any vermiculite, nearly the entirety of BNSF's railyard property was still covered with visible vermiculite:



3-SER582-84; 4-SER-1005-07 (BNSF railyard with areas of visible vermiculite indicated in yellow); 2-ER-255 (visible vermiculite found along tracks and within the railyard, with analytical results showing asbestos levels in soil from two to five percent).

A decades long cleanup effort was mandated by the EPA, but after portions of the railyard still could not be excavated to safe levels, parts of the railyard were instead capped and backfilled. 4-ER-923-24. The volume of material removed from BNSF's downtown Libby railyard demonstrates substantial contamination that BNSF maintained decades after it stopped all transport of vermiculite:

- 12,860 tons of soil removed (*i.e.* 918 large 14-ton dump trucks); 4-ER-913.
- 28,182 linear feet (*i.e.* 5.34 miles) of rails and other track materials removed; 4-ER-912.
- 8,000 rail ties removed (asbestos fibers permeated ties); 4-ER-912.
- Former dump area excavated with vermiculite and asbestos present at depths greater than six feet. 3-SER-577-802; 4-ER-923-24.



4-ER-914 (excavation); 4-ER-915 (capping and backfill).

Analysis of the asbestos content of the Libby vermiculite concentrate verified ranges between 0.3% and 7% asbestos. 3-SER-560, 570-72. Visible vermiculite found along tracks and within the railyard had analytical results showing asbestos levels in soil from two to five percent; when disturbed this soil had high potential for asbestos fibers to be released and become airborne. 2-ER-255-56.

Dr. Steven Compton, Plaintiffs' matter physics expert, testified that less than 1 percent asbestos in soil translates to 10 billion asbestos fibers per gram of soil. 3-SER-681, 684-85. Once disturbed by any means, including naturally occurring wind, asbestos will become airborne and can remain suspended in the air for hours or days traveling into the adjacent community of Libby. 3-SER-686-89. He, along with Plaintiff's air modelling expert, Dr. Julian Marshall, both ultimately opined that substantial amounts of airborne asbestos emanated from BNSF's Libby railyard and into Plaintiff's breathing zones. 3-SER-694-95; 1-SER-201, 205, 210-211.

Dr. Brent Staggs, Plaintiffs' medical expert, opined to a reasonable degree of medical certainty that both Wells' and Walder's exposures from the BNSF railyard were a substantial contributing factor to their development of malignant mesothelioma. 3-ER-512-13. Walder's findings were further confirmed through tissue biopsied, which contained substantial levels of Libby amphibole asbestos fibers and no other types of asbestos. 3-SER-639-42 ("78-or 80,000 [Libby amphibole asbestos] fibers per gram of tissue"). BNSF called no medical experts at trial.

BNSF knew the Libby vermiculite contained dangerous asbestos. BNSF railcars had warning signs

as of at least September 1977. 3-SER-563-65. The warning sign W.R. Grace affixed to the railcars provided:

CAUTION
PRODUCT CONTAINS ASBESTOS FIBERS
AVOID CREATING DUST
BREATHING ASBESTOS DUST MAY
CAUSE BODILY HARM

....

3-SER-570; 4-SER-1008.

In addition to Grace's warnings, the evidence showed BNSF had independent knowledge of the danger. In 1959, geologic investigations prepared by the Montana Bureau of Mines and Geology under cooperative agreement with BNSF's corporate predecessor noted vermiculite at the Zonolite/W.R. Grace mine is intertwined with asbestos such that "if a process could be perfected to make a clean separation of vermiculite and asbestos, both products would be marketable . . ." 3-SER-595-600; 4-ER-821. Moreover, going back to the 1920s, numerous publications and internal BNSF documents demonstrated that BNSF knew the dangers of Libby vermiculite containing asbestos.²

² 3-SER-604-06; 4-SER-757 (1960 progress report; amphibole component identified as tremolite); 3-SER-604-09; 4-SER-813 (1970 Bulletin); 3-SER-587-91; 4-SER-1010 (1976 correspondence documenting railroad employee's guided tour of the Grace mine); 3-SER-585-86, 610-11, 629, 635 (1970-1972 OSHA promulgated mandatory asbestos regulations); 3-SER-630-31 (1976: NIOSH created and determined no safe level of exposure to asbestos and only banning it would be adequate to protect workers); 3-SER-625-26 (1935: BNSF knew exposure to asbestos, silica, and lead

II. Procedural Background

Below, Judge Morris ruled on BNSF's Motion for Summary Judgment that BNSF was collaterally estopped from arguing that its handling of asbestos in Libby was not abnormally dangerous. 1-ER-122-132 (Order Granting in Part Pls.' Mot. Sum. J.) (citing *Eddy*, 459 P.3d 857).³ BNSF did not appeal from this ruling. Op. at 7. Judge Morris also noted that the Montana Supreme Court intended the common carrier exception "to be construed narrowly," reasoning that "BNSF similarly stands in the better position to have prevented, avoided, or mitigated the injury caused by the alleged presence of asbestos-contaminated materials at the Libby railway." 1-ER-136-137.

On BNSF's Motion for Directed Verdict, Judge Morris ruled that there was no "public duty" requiring BNSF to allow its railway to accumulate asbestos without cleanup, that this was an "other activity" outside its common carrier duties, and that BNSF maintained the premises for its "own purposes to earn revenue and continue transport operations without delay." 1-ER-51, 1-ER-49-50 ("[n]othing under BNSF's duty as a common carrier prevented Defendant from periodically cleaning the railway, or from improving

dust were the most dangerous hazards to railroad workers); 3-SER-633-34 (1937: BNSF knew asbestos was toxic dust and deadly); 3-SER-636 (1940s BNSF knew asbestos causes lung cancer); 3-SER-637 (1943: mesothelioma first reported in medical literature; 1960s well-established asbestos causes mesothelioma).

³ Like Judge Morris, U.S. District Court Judge Dana Christensen ruled BNSF was collaterally estopped "from arguing that its handling of asbestos in Libby was not an abnormally dangerous activity." *Gallegos*, Cause No. CV-22-68-M-DLC (D. Mont. Nov. 16, 2023), pp. 9-10.

its facilities to capture vermiculite dust for safe disposal.”).

After hearing the evidence, a unanimous Montana federal jury found BNSF strictly liable for its handling of asbestos in its Libby railyard and awarded Appellees \$4 million each. 4-ER-1005-10. The jury specifically found that “BNSF’s handling of vermiculite containing asbestos outside its duties as a common carrier was a substantial factor bringing about the injuries” to both plaintiffs. *Id.* While the jury returned a verdict for Appellees on their strict liability claims, it found in favor of BNSF on Appellees’ negligence claims and did not award punitive damages. Op. at 4.

Judge Morris confirmed post-trial that the common carrier exception did not apply to BNSF’s abnormally dangerous activity of “maintaining uncontained asbestos-containing material open air on its property.” 1-ER-24. Judge Morris rejected BNSF’s “expansive interpretation” of the common carrier exception, namely that BNSF’s operation of the Libby Railyard proves “necessary and inseparable from its public duty as a common carrier” stating that “approach would render [Restatement (Second) of Torts §] 519-520 redundant” and “no room would remain to impose strict liability . . . if 521 were read to encompass all aspects of a carrier’s operations” 1-ER-26-28. The Court “remain[ed] mindful that the Montana Supreme Court, in adopting the common carrier exception, likely intended the common carrier exception to be construed narrowly.” 1-ER-28. Judge Morris further held that BNSF maintained its railyard in that toxic condition for decades for its “own purposes to earn revenue and continue transport operations without delay[.]” 1-ER-50-51, *accord.* 1-ER-11.

On appeal, a three-judge Ninth Circuit panel overturned the jury's finding and reversed Judge Morris, adopting a broad rule regarding Montana law—beyond that decided by the Montana Supreme Court—providing there may be no strict liability for an activity that could not have occurred “but for” the transportation of vermiculite, and thereby legally determining that the common carrier exception swallows the rule. Op. at 13-14, 19. The panel held that “the dangerous condition here—accumulated asbestos dust—arose solely from BNSF’s operation as a common carrier executing its federally mandated duty to transport vermiculite.” Op. at 14. Under this interpretation (and rejection of the jury’s finding), BNSF cannot be held strictly liable for decades of failing to maintain its railyard because asbestos accumulated there, even though that transportation had ceased decades earlier. Op. at 5.

In determining that maintaining decades of asbestos dust accumulation in its railyard did not serve BNSF’s “own purposes,” the Ninth Circuit focused solely on whether there was evidence of a monetary cost. The Court ignored the second bases for Judge Morris’ “own purposes” finding (*i.e.* continue transport operations without delay) which was supported by ample record evidence that massive cleanup efforts were undertaken by BNSF only when it was required to do so by the EPA. Op. at 15-17. Between 2003 and 2005, BNSF’s cleanup efforts led to 12,860 tons of asbestos-containing soils and more than five miles of rail and track material (8,000 rail ties) being removed. 4-ER-923-24. By the end of this process, nearly the entirety of BNSF’s railyard property was excavated and either filled or capped. *Id.* The

undisputed effort was massive. BNSF undertook this effort to avoid the consequences of the railyard contamination for its “own purposes”—to continue operations and avoid further EPA liability—not because it was required to do so as a common carrier. 1-ER-50-51.

III. This Court Should Have Certified the Question to the Montana Supreme Court

It is undisputed that this case is the first and only case in which any court has determined the scope of Montana’s newly adopted (in *Eddy*) common carrier exception to strict liability for harm caused by asbestos in or on BNSF’s Libby railyard. That precise issue is the core (still) unresolved question in 210 cases pending in Montana state courts. *See* Doc. 31.1 (Mot. to Certify — Ex. 1 (Mariman Decl.)), ¶¶ 1, 6. That alone signifies the importance of having this specific issue of Montana law decided by Montana’s highest court.

In denying certification, this Court reasoned that there was sufficient Montana law to answer the question presented stating:

Plaintiffs attempt to hold BNSF strictly liable for the “manner in which it conducted the transport of vermiculite,” which the Montana Supreme Court specifically foreclosed in *Eddy*. *Id.* at 874.

Op at 19. That rationale is belied by the Court’s own characterization of Plaintiffs’ strict liability claim:

The district court adopted Plaintiffs’ characterization of BNSF’s “abnormally dangerous activity” as “maintain[ing] asbestos on its

property.” Plaintiffs framed BNSF’s conduct as an affirmative act (“maintaining”), but their theory of strict liability was actually premised on BNSF’s alleged “fail[ure] to take measures to prevent toxic dust from collecting upon and escaping from its property.” That theory, which assumes that the risk of harm would have been eliminated if BNSF had “adequately clean[ed]” its railyard, effectively treats Plaintiffs’ strict liability claims as negligence claims.

Op. at 17.

Plaintiffs’ strict liability claim is not the “manner in which [BNSF] conducted the transport of vermiculite.” Rather, it relates directly to the condition and maintenance of BNSF’s property, specifically its railyard. This issue was not decided in *Eddy* and therefore is ripe for certification.

Montana has unique and long-established inalienable rights associated with a clean and healthful environment. The Montana Constitution guarantees citizens the inalienable right to a “clean and healthful environment.” Mont. Const. Art. II, Sec. 3. “The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” Mont. Const. Art. IX, Sec. 1.

As such, the Montana Supreme Court has created a body of strict liability law starting with *Dutton v. Rocky Mountain Phosphates*, 151 Mont. 54, 68, 438 P.2d 674, 681 (1968), where a neighboring landowner was strictly liable for allowing toxins to escape their property causing harm to neighboring cattle. That body of Montana strict liability law continued with

Matkovic v. Shell Oil Co., 218 Mont. 156, 707 P.2d 2 (1985). Later, the Montana Supreme Court recognized that section 519 strict liability applies to abnormally dangerous conditions. *Covey v. Brishka*, 445 P.3d 785, 792 (2019). The Montana Supreme Court has shown great interest in deciding Montana issues related to Montana’s unique right to a clean and healthful environment including with the imposition of strict liability on property owners. This issue of first impression, namely the scope of the sole exception to strict liability adopted by the Montana Supreme Court in *Eddy*, is uniquely Montanan and should be decided by the Montana Supreme Court.

This Court’s concern about “effectively treat[ing] Plaintiffs’ strict liability claims as negligence claims[.]” Op. 17, ignores the fact the Montana Supreme Court in *Eddy* expressly considered BNSF’s negligence as one of the six § 519 strict liability factors “(c) Inability to eliminate the risk by the exercise of reasonable care.” *Eddy*, 459 P.3d at 869. There, the Court found that factor weighed in favor of finding BNSF strictly liable. *Id.* at 870-71. Notably, the Montana Supreme Court held these six factors are not each, separately required, but must only be considered.

“To make a determination that an activity is abnormally dangerous, all factors need not be present, but a district court must nonetheless consider all the factors.” *Covey*, ¶ 23 (citing *Chambers v. City of Helena*, 2002 MT 142, ¶ 21, 310 Mont. 241, 49 P.3d 587).

Id. at 869; accord Op. 11. That means an abnormally dangerous activity or condition could be eliminated by

the exercise of reasonable care (*i.e.*, not negligence) and still be subject to strict liability.⁴

The Court indicated its hesitance with Plaintiffs' request for certification because Plaintiffs filed this case in federal court rather than state court. Op. at 17. As stated in Plaintiffs' complaint, there is diversity jurisdiction. Additionally, as stated in response to the Court's question at oral argument, the *Eddy* case was remanded in March 2020 and was not set for trial until March 2021, a year later. In the interim, the Plaintiffs in this case died in March 2020 and October 2020. Before the *Eddy* trial could occur, in February 2021, it was vacated *sua sponte* due to the impact on day-to-day non-civil work (*i.e.* criminal, dependent neglect, etc.) on this single state court judge conducting a 2-week trial off-site as required by then-existing COVID restrictions. All the while, the Montana Federal Court presented at CLEs its willingness to conduct trials and do so expeditiously. Thus, this case was filed in September 2021 in Montana Federal Court.

Certification "strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to rule on an undecided or unclear issue." *Kremen v. Cohen*, 325 F.3d 1035, 1037, n.1 (9th Cir. 2003) (quoting Jerome I. Braun, *A Certification Rule for California*, 36 Santa Clara L. Rev. 935, 940 (1996)). The scope of Montana's common carrier exception to strict liability is a "significant" issue with "important public policy ramifications" that

⁴ The *Eddy* Court's strict liability finding was applied via issue preclusion to BNSF in this case, which BNSF did not appeal. Op. at 11.

has (still) not yet been presented to or resolved by the Montana Supreme Court. *See Munson v. Del Taco, Inc.*, 522 F.3d 997, 1002-03 (9th Cir. 2008) (citing *Kremen*, 325 F.3d at 1037). Accordingly, it is more appropriate for the Montana Supreme Court to definitively provide the answer in the first instance.

Given the paramount, overarching issues of first impression for Montana law in this case, important public policy ramifications yet unresolved in Montana in light of *Eddy*, and the clarity of resolution of this issue by the Montana Supreme Court over Montana Asbestos Claims Court caseloads where 210 other Libby community asbestos exposure cases (with 388 Plaintiffs) are pending, this Court should certify the following question of state law to the Montana Supreme Court:

Does Montana's common carrier exception to strict liability for an abnormally dangerous activity or condition immunize BNSF from strict liability for harm caused by asbestos in or on its Libby railyard, when the prolonged presence of this toxic substance in and on its Libby railyard was not required by BNSF's statutory duties as a common carrier?

Glacier Bear Retreat, LLC v. Dusek, 107 F.4th 1049, 1052-53 (9th Cir. 2024).

CONCLUSION

For the foregoing reasons, Appellees respectfully request this Court rehear *en banc* Appellee's Motion to Certify.

Date: March 10, 2026.

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