IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 12

WCC No. 2019-4756

KAREN MONROE, Individually and as Personal Representative of the Estate of Dwane Monroe, and FRANCIS McGOVERN, Trustee of the Libby Medical Plan Trust

Petitioners

vs.

MACO WORKERS COMP TRUST

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioners together assert that they are entitled to $55,457.83 in medical benefits. Respondent moves for summary judgment, asserting that: (1) Petitioners are not proper parties and that this Court does not have jurisdiction over their claims; (2) Petitioners' claims are barred by statutes of limitations; (3) Petitioners' claims are barred by collateral estoppel; (4) Petitioners' claims are barred by the "law of gifts"; and that (5) Petitioners are not entitled to recover because they have engaged in unlawful collusion.

Held: Respondent is not entitled to summary judgment. Petitioners are proper parties and this Court has jurisdiction over their claims for medical benefits, and their claims are not barred by collateral estoppel. Moreover, Respondent has not established that Petitioners' claims are barred by an applicable statute of limitations. Finally, Respondent has not established the absence of issues of material fact over its "law of gifts" and collusion defenses.

¶ 1 Petitioner Karen Monroe, Individually and as Personal Representative of the Estate of Dwane Monroe (Monroe) and Petitioner Francis McGovern, as Trustee of the Libby Medical Plan Trust (LMP Trust), together assert entitlement to $55,457.83 in medical benefits under § 39-71-704, MCA, from Respondent MACO Workers Comp Trust (MACO). The $55,457.83 is the amount that W.R. Grace's (Grace) Libby Medical

Program paid for treatment of Dwane Monroe's (Dwane) asbestos-related disease, which this Court thereafter ruled was a compensable occupational disease for which MACO is liable. The LMP Trust asserts that it is the "indisputable successor-in-interest" of the Libby Medical Program and that it acquired Grace's right to seek reimbursement for "wrongly paid benefits" in the settlement of the tort claims against Grace. Monroe and the LMP Trust argue that the LMP Trust has the right to recover directly from MACO the amounts that the Libby Medical Program paid for Dwane's medical care to treat his asbestos-related disease. In the alternative, because the LMP Trust has demanded that Monroe pay it for the amounts that the Libby Medical Program paid for Dwane's medical care, Monroe and the LMP Trust argue that MACO must pay the medical benefits to her, so she can pay the LMP Trust.

¶ 2 For many reasons, MACO asserts that it is not liable for the medical benefits.

¶ 3 The parties have filed cross motions for summary judgment. This Court has considered all of the evidence that the parties have submitted and all of their arguments, regardless of the title of the brief to which the evidence was attached or in which the argument was made. However, this Court has evaluated each party's motion on its own merits, as this Court is required to do under Montana law.[1]

¶ 4 This Court has denied Petitioners' summary judgment motion[2] and, as set forth below, denies Respondent's summary judgment motion. Because there are several material issues of fact, this Court will issue a Scheduling Order setting this case for trial.

FACTS

¶ 5 Dwane worked for Grace from 1967 to 1990. In 1991, Dwane filed an occupational disease claim, asserting that he had lung disease "caused by years of exposure to tremolite asbestos dust."[3] He settled his claim on a disputed liability basis.[4]

¶ 6 Dwane worked for the Lincoln County Road Department from 1997 to 2008. He was exposed to Libby asbestos in the course of his employment with Lincoln County.

¶ 7 Many of those injured by Libby asbestos brought tort claims against Grace.

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[1] *See Putnam v. Cent. Mont. Med. Ctr.*, 2020 MT 65, ¶ 12, 399 Mont. 241, 460 P.3d 419 (citation omitted) ("On cross-motions for summary judgment, the district court . . . must evaluate each party's motion on its own merits.").

[2] *Monroe v. MACO Workers Comp Trust,* 2020 MTWCC 11.

[3] *Monroe v. MACO Workers Comp Trust (Monroe I)*, 2014 MTWCC 7, ¶ 5.

[4] *Monroe I*, 2014 MTWCC 7, ¶ 5.

¶ 8 In 2000, Grace established and funded the Libby Medical Program to pay the medical expenses of those who were injured by exposure to Libby asbestos.[5]

¶ 9 In *Moreau v. Transportation Ins. Co.* (*Moreau II*), the Montana Supreme Court stated that the undisputed testimony in that case established that Grace voluntarily created the Libby Medical Program and did not intend to seek reimbursement for medical bills paid by the Libby Medical Program for those with an asbestos-related disease caused by an exposure to Libby asbestos; the court stated that based on the undisputed testimony, this Court found as follows:

> Grace created the LMP to assist residents of Libby, Montana, in paying for medical costs arising from asbestos exposure from vermiculite mining. The LMP medical payments were made with "no strings attached" and LMP did not demand or expect any reimbursement from any source. Grace's establishment of the LMP was "voluntary with no conditions" and Grace disclaimed any intention to seek reimbursement for any payments made by the LMP.[6]

¶ 10 The Libby Medical Program paid $55,457.83 in medical bills for Dwane's asbestos-related disease.

¶ 11 Dwane's last day of work for Lincoln County was in March 2008.

¶ 12 Dwane died from his asbestos-related disease on September 20, 2010.

¶ 13 In 2012, Grace was in Chapter 11 bankruptcy.

¶ 14 In 2012, the Libby Claimants – in general, those who had brought tort claims against Grace – and Grace agreed to a settlement under which the Libby Medical Program was terminated and the LMP Trust was created with a payment from Grace. Pursuant to the settlement, "all rights and duties whatsoever of Grace . . . under the Libby Medical Program from and after the Libby Settlement Effective Date shall be transferred to the LMP Trustee."

¶ 15 McGovern was appointed the initial trustee of the LMP Trust and remains trustee.

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[5] *See Moreau v. Transp. Ins. Co*. (*Moreau II*), 2018 MT 1, ¶ 4, 390 Mont. 102, 408 P.3d 538 (although the Montana Supreme Court stated that the Libby Medical Program was to pay the medical expenses of Grace's employees, a person could enroll in the Libby Medical Program if they "lived or worked within a 20-mile radius of the Libby Mine or Mill at least 5 years before" their diagnosis of an asbestos-related disease). In court decisions, the Libby Medical Program is sometimes called the "Libby Medical Plan" and is oftentimes shortened to "LMP."

[6] *Moreau II*, 2018 MT 1, ¶ 8. *See also Moreau v. Transp. Ins. Co*., 2017 MTWCC 7, ¶¶ 9-10 (noting (1) that Jay Flynn, MD, the medical director of the Libby Medical Program, testified that the program paid bills with "no strings attached" and that the Libby Medical Program "never made any demand for reimbursement nor did it expect reimbursement"; (2) that an executive from Grace testified that the money deposited into the Libby Medical Program was "voluntary with no conditions"; and (3) that an attorney representing Grace in its bankruptcy "informed the parties that W.R. Grace would not seek reimbursement.").

¶ 16 On March 17, 2014, this Court found and concluded that Dwane's asbestos-related disease was an occupational disease for which MACO was liable.[7]

¶ 17 On October 10, 2014, the LMP Trust retained one of the law firms representing Monroe to "pursue reimbursement" of the amounts the Libby Medical Program paid for treatment of those with an occupational disease under Montana law.

¶ 18 On December 4, 2014, one of Monroe's attorneys wrote to MACO's attorney demanding the payment of certain medical bills, which MACO had not paid after this Court adjudged MACO liable for Dwane's occupational disease, including the payment to Monroe of the $55,457.83 in medical bills that the Libby Medical Program had paid for treatment of Dwane's asbestos-related disease.

¶ 19 On April 15, 2015, Monroe filed a second Petition for Hearing against MACO (*Monroe II*), asserting, *inter alia*, that she was entitled to recover the $55,457.83 in medical benefits.[8]

¶ 20 On May 15, 2017, this Court granted summary judgment in favor of MACO. In *Monroe II*, this Court ruled that the case was "factually on point with *Moreau v. Transportation Ins. Co*.,"[9] a case decided at the same time in which this Court ruled that, under the Montana Supreme Court's decision in *Shepard v. Midland Foods, Inc*.,[10] Moreau was not entitled to recover medical benefits under § 39-71-704, MCA, from a workers' compensation insurer in the amount that the Libby Medical Program had paid in medical bills.[11]

¶ 21 Monroe and Moreau appealed this Court's decisions to the Montana Supreme Court.[12] Monroe and MACO agreed to stay Monroe's appeal pending the court's decision in *Moreau II*.[13]

¶ 22 On January 2, 2018, the Montana Supreme Court issued its decision in *Moreau II*, holding that *Shepard* was still good law and affirming this Court's ruling that Moreau was

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[7] *Monroe I*, 2014 MTWCC 7.

[8] *Monroe v. MACO Workers Comp Trust (Monroe II)*, WCC No. 2015-3560.

[9] *Monroe II*, No. 2015-3560 (Mont. Workers' Comp. Ct. May 15, 2017) (Order Den. Petr's Mot. for Summ. J. and Granting Summ. J. in Favor of Resp't, ¶ 19) (citing *Moreau v. Transp. Ins. Co*., 2017 MTWCC 7).

[10] 219 Mont. 124, 710 P.2d 1355 (1985).

[11] *Moreau v. Transp. Ins. Co*., 2017 MTWCC 7, ¶ 23.

[12] *Moreau v. Transp. Ins. Co*., Mont. Sup. Ct. Case No. DA 17-0320; *Monroe v. MACO Workers Comp. Trust,* Mont. Sup. Ct. Case No. DA 17-0319.

[13] *Monroe v. MACO Workers Comp. Trust*, No. DA 17-0319 (Mont. Sup. Ct. June 6, 2017) (Order Granting Appellant's Unopposed Mot. to Stay Appeal Proceedings).

not entitled to recover medical benefits from Transportation Insurance in the amount that the Libby Medical Program had paid.[14]

¶ 23 On March 5, 2018, the Montana Supreme Court granted Monroe's Unopposed Motion to Dismiss her appeal.[15]

¶ 24 On February 20, 2019, the LMP Trust sent a letter to Monroe demanding that she pay it the $55,457.83 that the Libby Medical Program had paid for Dwane's medical treatment for his asbestos-related disease.[16] The LMP Trust's attorneys, who also represent Monroe, drafted the letter for the LMP Trust. McGovern signed the letter.

¶ 25 McGovern testified that he is pursuing the claim against Monroe because of his obligation to the LMP Trust. However, McGovern acknowledged that the LMP Trust has not filed a lawsuit against Monroe to recover the $55,457.83 from her and that he is relying on the LMP Trust's attorneys and did not know if they had plans to do so.

¶ 26 Monroe testified that the LMP Trust's demand letter, "scared me to death because I had no idea what it was about or why. I was told that the bills had been paid nine years ago."

¶ 27 On May 31, 2019, one of Monroe's other attorneys sent MACO a copy of the LMP Trust's letter with a cover letter "demanding that MACO pay my client $55,457.83 in medical benefits so that she can, in turn, reimburse the Trust."

¶ 28 On August 26, 2019, Monroe and the LMP Trust, jointly represented by the same attorneys, filed their Petition for Hearing. They assert that MACO is liable for $55,457.83 in medical benefits under § 39-71-704, MCA, because the LMP Trust has demanded that Monroe pay it the $55,457.83 that the Libby Medical Program paid for treatment of Dwane's asbestos-related disease.

LAW AND ANALYSIS

¶ 29 This case is governed by the 2007 version of the Montana Workers' Compensation Act because that was the law in effect on Dwane's last day of work for Lincoln County.[17]

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[14] *Moreau II*, 2018 MT 1, ¶¶ 19-23.

[15] *Monroe v. MACO Workers Comp. Trust*, No. DA 17-0319 (Mont. Sup. Ct. Mar. 5, 2018) (Order [Dismissing Appeal]).

[16] Although McGovern's letter states that the LMP Trust had paid the $55,457.83 and seeks "repayment," it is established from the other evidence in the record and by Monroe's and the LMP Trust's statement of facts, that it was actually the Libby Medical Program that had paid the $55,457.83. McGovern also testified that it was his understanding that the LMP Trust "never paid anything on behalf of Dwane Monroe."

[17] *Monroe I*, 2014 MTWCC 7, ¶ 35 (citations omitted).

¶ 30 To prevail on a motion for summary judgment, the moving party must meet its initial burden of showing the "absence of a genuine issue of material fact and entitlement to judgment as a matter of law."[18]

¶ 31 Section 39-71-704, MCA, states, in relevant part:

> **Payment of medical, hospital, and related services — fee schedules and hospital rates — fee limitation.** (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished**:**
>
> (a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires.

¶ 32 This Court and the Montana Supreme Court addressed when a workers' compensation insurer must reimburse another entity for medical bills paid, or pay the claimant directly, under § 39-71-704, MCA, in *Shepard*.[19] Shepard injured his knee in an industrial accident and incurred medical bills.[20] Because the insurer initially denied liability for his claim, Medicare and private health insurance paid some of Shepard's bills.[21] This Court ruled that the workers' compensation insurer was not required to pay the value of these medical bills to Shepard, explaining: "If, at a future date, claimant is sued for medical costs which should have been paid by defendant, claimant may file a Petition asking for a ruling on the matter . . . . If the claimant is held responsible, it is clearly the insurer's obligation to pay medical benefits; thus, litigation of that issue seems unlikely."[22]

¶ 33 On appeal, Shepard argued that the workers' compensation insurer was liable either to reimburse Medicare and his private health insurer for the amounts each had paid, or to pay those amounts to him.[23] The Montana Supreme Court rejected both arguments.[24] First, the court held that since neither Medicare nor the health insurer was a party to the case, this Court did not have jurisdiction to "adjudicate any right to reimbursement which those entities had."[25] Second, the court rejected Shepard's

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[18] ARM 24.5.329. *See also Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 15 (citation omitted).

[19] 219 Mont. 124, 710 P.2d 1355.

[20] *Shepard*, 219 Mont. at 125, 710 P.2d at 1356.

[21] *Shepard*, 219 Mont. at 126, 710 P.2d at 1356.

[22] *Shepard*, 219 Mont. at 127, 710 P.2d at 1357.

[23] *Shepard*, 219 Mont. at 128, 710 P.2d at 1358.

[24] *Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358.

[25] *Shepard*, 219 Mont. at 128, 710 P.2d at 1358.

argument that the workers' compensation insurer was liable to pay him the medical benefits under § 39-71-704, MCA.[26] The court explained:

> Contrary to appellant's assertion, this statute is not authority for ordering respondent to pay appellant for medical expenses already paid by other health care providers. The statute requires the insurer to furnish *reasonable* services, medicine and treatment. To order the insurer to pay appellant for medical expenses already paid is not furnishing services nor is it reasonable. . . .
>
> Appellant Shepard is here asking for a windfall. The lower court ruled that if Shepard were sued for medical expenses, he could petition the Workers' Compensation Court for relief. That ruling is logical, equitable and can provide Shepard with prompt relief. We hold that the lower court did not err in its ruling on this issue.[27]

¶ 34 The Montana Supreme Court again addressed this issue in *Moreau II*.[28] The Libby Medical Program paid $95,846 for treatment of Edwin Moreau's asbestos-related disease.[29] Thereafter, Transportation Insurance accepted liability for Edwin's asbestos-related disease as an occupational disease.[30] Edwin's widow, as the personal representative of Edwin's estate, demanded that Transportation Insurance pay her the $95,846.[31] However, relying on *Shepard*, the court held that Transportation Insurance was not obligated to pay Edwin's widow the $95,846 under § 39-71-704, MCA, because, "Edwin was not entitled to recover the value of the medical benefits in addition to the medical services themselves."[32] The court emphasized that part of *Shepard* stating, "if Shepard were sued for medical expenses, he could petition the Workers' Compensation Court for relief."[33] The court also rejected Moreau's argument that Transportation Insurance was subrogating in contravention of the made-whole doctrine because, "[a]n employee with a work-related injury is entitled only to the benefits provided by the applicable legislation," and because Transportation Insurance was "not seeking to recover any money."[34]

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[26] *Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358.

[27] *Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358 (emphasis in original).

[28] 2018 MT 1, 390 Mont. 102, 408 P.3d 538.

[29] *Moreau II*, 2018 MT 1, ¶ 9.

[30] *Moreau II*, 2018 MT 1, ¶¶ 3, 9.

[31] *Moreau II*, 2018 MT 1, ¶ 10.

[32] *Moreau II*, 2018 MT 1, ¶ 19.

[33] *Moreau II*, 2018 MT 1, ¶ 21 (quoting *Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358).

[34] *Moreau II*, 2018 MT 1, ¶¶ 17-19.

¶ 35 Here, Monroe and the LMP Trust assert that this case does not fall under *Shepard* nor *Moreau II* because the LMP Trust is now seeking payment from Monroe in the amount that the Libby Medical Program paid for treatment of Dwane's asbestos-related disease. MACO asserts five defenses upon which it claims it is entitled to summary judgment. Notwithstanding, for the following reasons, MACO is not entitled to summary judgment on any of these defenses.

Proper Parties and Jurisdiction

¶ 36 MACO argues that this Court does not have jurisdiction to decide the LMP Trust's claims on the grounds that the LMP Trust did not mediate its dispute, as required by § 39-71-2408, MCA.[35] However, in its statement of "Uncontested Facts," MACO itself states that the LMP Trust petitioned for mediation and that a mediation conference was held on June 19, 2018.[36] Thus, this Court has jurisdiction over this case under the Workers' Compensation Act's mediation provisions.

¶ 37 MACO also argues that neither Monroe nor the LMP Trust has standing to pursue this case and that this Court does not have subject matter jurisdiction under § 39-71-2905(1), MCA, which states, in relevant part: "A claimant or an insurer who has a dispute concerning any benefits under [the Workers' Compensation Act] may petition the workers' compensation judge for a determination of the dispute . . . ." MACO asserts that "claimant" means "injured employee" and that neither Monroe nor the LMP Trust is a "claimant."

¶ 38 However, Monroe and the LMP Trust are correct that the word "claimant" is not limited to an "injured employee." In other parts of the Workers' Compensation Act, the Legislature uses "employee" when it is referring to the person who sustained the injury or occupational disease.[37] Thus, when the Legislature used the word "claimant" in § 39-71-2905, MCA, it meant any person who or entity which has a claim for or involving workers' compensation benefits. The Montana Supreme Court has noted that this Court has decided cases "not strictly involving disputes between insurers and employees" and has jurisdiction over such cases because it has jurisdiction over "matters that go beyond the minimum determination of the benefits payable to an employee."[38] In *Moreau v. Transportation Ins. Co.* (*Moreau I*), the Montana Supreme Court held, in a case with a factual situation almost identical to that in this case, that the personal representative of

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[35] *See, e.g.*, *Preston v. Transp. Ins. Co.*, 2004 MT 339, ¶ 36, 324 Mont. 225, 102 P.3d 527 (holding that under § 39-71-2408(1), MCA, this Court does not have jurisdiction over a dispute over benefits until the parties have completed the mandatory mediation process).

[36] Respt's Br. in Supp. of Mot. for Summ. J., Docket Item No. 18, ¶¶ 17, 18.

[37] *See* §§ 39-71-407(1), (8), MCA (providing that insurers are liable for benefits to "an employee of an employer" who receives "an injury arising out of and in the course of employment" and that insurers are liable for benefits to "an employee of an employer" who contracts "an occupational disease that arises out of or is contracted in the course and scope of employment.").

[38] *State ex rel. Uninsured Emp'r Fund, Div. of Workers' Comp. v. Hunt*, 191 Mont. 514, 518-19, 625 P.2d 539, 541-42 (1981).

an estate of a decedent who died as a result of an occupational disease has standing to pursue a claim for medical benefits in this Court for the amounts that the Libby Medical Program paid for treatment of the decedent's asbestos-related disease.[39] The dispute in this case is whether Monroe or the LMP Trust is entitled to recover medical benefits from MACO under § 39-71-704, MCA. Thus, the Estate and the LMP Trust have standing and this Court has subject matter jurisdiction to decide the dispute.[40]

¶ 39 MACO misplaces its reliance on this Court's order denying Grace's motion to intervene in *Moreau II* in support of its argument that Monroe and the LMP Trust are not proper parties.[41] This Court ruled that although Grace had agreed to reimburse Transportation Insurance for medical benefits for which Transportation Insurance was liable, Grace was not a proper party because it was not directly liable for Moreau's benefits; rather, as a Plan No. 2 insurer, Transportation Insurance was directly liable and Grace was "one step removed."[42] This Court also ruled that it did not have jurisdiction over Grace because it was not an insurer.[43] But here, Monroe and the LMP Trust assert that they are entitled to recover medical benefits under § 39-71-704, MCA, from MACO, the insurer directly liable for benefits for Dwane's occupational disease. Monroe and MACO each allege "injury" to a property right – their asserted right to medical benefits for which MACO, an insurer over which this Court has jurisdiction, has denied liability. Therefore, Monroe and the LMP Trust are the proper parties to litigate this dispute.[44]

Collateral Estoppel

¶ 40 Relying upon *Stewart v. Liberty Northwest Ins. Corp.*,[45] MACO argues that Monroe is collaterally estopped from re-litigating the issue of whether MACO must pay her the $55,457.83. In *Stewart*, the Montana Supreme Court explained, "The doctrine of

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[39] *Moreau v. Transp. Ins. Co. (Moreau I)*, 2015 MT 5, 378 Mont. 10, 342 P.3d 3.

[40] *See* § 39-71-2905, MCA (stating that the workers' compensation judge has jurisdiction to decide "a dispute concerning any benefits under" the Workers' Compensation Act).

[41] *Moreau v. Transp. Ins. Co.*, 2015 MTWCC 17.

[42] *Moreau v. Transp. Ins. Co.*, 2015 MTWCC 17, ¶¶ 17-19.

[43] *Moreau v. Transp. Ins. Co.*, 2015 MTWCC 17, ¶ 21.

[44] *See In re Guardianship and Conservatorship of A.M.M.*, 2015 MT 250, ¶ 27, 380 Mont. 451, 356 P.3d 474 (stating, "Standing resolves the issue of whether the litigant is a proper party to seek adjudication of a particular issue, not whether the issue is justiciable. To establish standing, the complaining party must clearly allege past, present, or threatened injury to a property or civil right, and the alleged injury must be distinguishable from the injury to the public generally, but it need not be exclusive to the complaining party." (citations omitted)).

[45] 2013 MT 107, 370 Mont. 19, 299 P.3d 820.

collateral estoppel, which embodies the concept of issue preclusion, bars a party from relitigating an issue where that issue has been litigated and determined in a prior suit."[46]

¶ 41 However, the issue in this case is not "identical" to the issue litigated in the prior case, the first element of collateral estoppel.[47] In her prior case against MACO, Monroe asserted that she was entitled to and could keep the $55,457.83 under the theory that MACO was the primary payor and had a duty to pay her the medical benefits under § 39-71-704, MCA, even though the Libby Medical Program had already paid the medical bills.[48] In this case, Monroe asserts that she is entitled to the $55,457.83 so she can "reimburse" the LMP Trust because the LMP Trust has now demanded that she pay it the amount that the Libby Medical Program paid for Dwane's medical bills. In *Shepard* and *Moreau II*, the Supreme Court specifically held that if the claimants were thereafter sued for reimbursement, they could petition this Court for relief.[49] Although the LMP Trust has not sued Monroe, it has demanded that she pay it the amounts that the Libby Medical Program paid for Dwane's medical bills. Because the issue of whether Monroe is entitled to the medical benefits so she can pay the LMP Trust is different than the issue of whether she is entitled to keep the medical benefits, which was the issue in her earlier case, her claim against MACO in this case is not barred by collateral estoppel.

Statute of Limitations

¶ 42 MACO asserts that the LMP Trust's claim against Monroe is time barred under § 72-3-803(1)(a), MCA, which provides that claims against an estate must be brought "within 1 year after the decedent's death." However, MACO cites no authority under which this Court could determine that MACO has standing to assert a statute of limitations defense on Monroe's behalf. Moreover, it cites no authority under which this Court could determine that the statute of limitations at § 72-3-803(1)(a), MCA, applies to the LMP Trust's claim against Monroe given that this Court did not decide that Dwane's asbestos-related disease was an occupational disease for which MACO was liable until March 17, 2014, which was more than three years after Dwane's death. It is not this Court's obligation to conduct legal research on MACO's behalf.[50] Thus, MACO has not shown that it is entitled to judgment as a matter of law on the grounds that the LMP Trust's claim against Monroe is barred by the statute of limitations at § 72-3-803(1)(a), MCA.

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[46] *Stewart*, ¶ 19 (internal quotation marks and citations omitted).

[47] *Stewart*, ¶¶ 20-21.

[48] *Monroe II,* No. 2015-3560 (Mont. Workers Comp. Ct. May 15, 2017) (Order Den. Petr's Mot. for Summ. J. and Granting Summ. J. in Favor of Resp't, ¶ 18) ("Monroe argues that, since MACO has been adjudged liable for Dwane's OD, under § 39-71-704, MCA, MACO has a statutory duty to pay benefits and this Court should therefore order MACO to pay her the value of the medical bills Dwane incurred.").

[49] *Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358; *Moreau II*, 2018 MT 1, ¶ 21.

[50] *See Johansen v. Dep't of Nat. Res. & Conservation,* 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653 (citation omitted).

¶ 43 Without citing a specific statute of limitations, MACO also asserts that Monroe's and the LMP Trust's claims must be time-barred. Relying on *Montana Petroleum Tank Release Compensation Board v. Capitol Indemnity Co*.,[51] MACO states that the longest statute of limitations in Montana is the eight-year statute of limitations in § 27-2-202(1), MCA, the statute of limitations for "action upon any contract, obligation, or liability founded upon an instrument in writing."[52] MACO reasons that because Dwane died in 2010 and this case was not filed until 2019, it must be time-barred. However, Monroe and the LMP Trust are correct that their current claim for medical benefits did not accrue until March 17, 2014, when this Court ruled that Dwane's asbestos-related disease was an occupational disease for which MACO was liable, because the LMP Trust could not have brought its claim against MACO until Monroe prevailed on her case against MACO and because this Court could not have accepted jurisdiction of the LMP Trust's claim until it ruled that Dwane had a compensable occupational disease for which MACO was liable.[53] The LMP Trust filed its claim against MACO on August 26, 2019, which is well within eight years of when Monroe's and the LMP Trust's current claims against MACO accrued. Thus, MACO has not established that it is entitled to judgment as a matter of law on its statute of limitations defense.

Gifts

¶ 44 Relying upon *Sturdevant v. Mills*,[54] MACO argues that the Libby Medical Program did not have the right to seek reimbursement for the medical bills it paid for Dwane's medical care because they were voluntary payments, which MACO characterizes as "gifts." In *Sturdevant*, the court held that a general insurance agent could not recover his advances to an agent he had hired to sell life insurance because the advances were "voluntary payments" with "no agreement between him and the agent requiring the Agent to repay the advances."[55]

¶ 45 However, this Court agrees with Monroe and the LMP Trust that there is evidence supporting their position that the Libby Medical Program's payments were not voluntary payments nor "gifts." A reasonable inference that can be drawn from the fact that many of those injured by their exposure to Libby asbestos brought tort claims against Grace is that Grace created the Libby Medical Program because of its recognized tort liability, i.e., that its payments of medical bills for those injured by their exposure to Libby asbestos

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[51] 2006 MT 133, 332 Mont. 352, 137 P.3d 522.

[52] This Court notes that in *Montana Petroleum*, in which the court considered a breach of contract claim, the court did not express that the longest statute of limitations in Montana is eight years; rather, the court stated that the longest statute of limitations for a breach of contract claim is eight years. *Mont. Petroleum*, ¶ 19.

[53] *See* § 27-2-102(1)(a), MCA ("For the purposes of statutes relating to the time within which an action must be commenced: (a) a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action . . . .").

[54] 177 Mont. 137, 580 P.2d 923 (1978).

[55] *Sturdevant*, 177 Mont. at 142, 580 P.2d at 926.

was neither voluntary nor a "gift." Because there is an issue of material fact, MACO is not entitled to judgment as a matter of law on its "law of gifts" defense.

Collusion

¶ 46 Relying upon *Abby/Land, LLC v. Glacier Construction Partners, LLC*,[56] MACO argues that Monroe and the LMP Trust have engaged in collusion and that the remedy is to dismiss this case. Monroe and the LMP Trust assert that they have not engaged in collusion because it is not unlawful for them to jointly pursue their claims against MACO.

¶ 47 In *Abby/Land*, the Montana Supreme Court considered whether a $12 million stipulated judgment in a case with reasonable damages of $2.4 million was enforceable against a liability insurer which had breached its duty to defend its insured.[57] The court reaffirmed that under Montana law, "the insurer will be bound by its insured's settlement and any resulting judgment so long as the settlement is reasonable and not the product of collusion."[58] The court explained that, "[t]he term 'collusion' implies the existence of some sort of agreement aimed at defrauding another or otherwise breaking the law."[59] If the settlement is unreasonable and the product of collusion – i.e., contrived – then the district court can dismiss the case entirely or fashion an equitable remedy.[60] The court explained that the trial court should consider the amount of misconduct of the colluding parties when deciding the appropriate remedy.[61] In *Abby/Land*, the court explained that the colluding parties' misconduct – which included the insured's agreement to amend a contract to expose it to greater liability and to "expand the recoverable damages"[62] against it and the insured's attorney's request that the other party's expert increase his damages calculations[63] – was "egregious" and "offensive to our sense of justice, and to allow recovery under these circumstances would impair the public's trust in the judicial system."[64] Thus, the court held that the appropriate remedy was to dismiss the case against the insurer with prejudice;[65] i.e., the colluding parties recovered nothing.

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[56] 2019 MT 19, 394 Mont. 135, 433 P.3d 1230.

[57] *Abby/Land*, ¶¶ 1, 2.

[58] *Abby/Land*, ¶ 34 (citations omitted).

[59] Abby/Land, ¶ 42 (citations omitted).

[60] *Abby/Land*, ¶ 56 (citations omitted).

[61] *Abby/Land*, ¶ 57.

[62] *Abby/Land*, ¶¶ 46, 58.

[63] *Abby/Land*, ¶ 47.

[64] *Abby/Land*, ¶¶ 59, 60.

[65] *Abby/Land*, ¶ 60.

¶ 48 MACO is correct that under *Shepard* and *Moreau II*, the demand for payment from the injured worker must be an actual demand and not a contrived demand.[66] And while Monroe and the LMP Trust are correct that it is not necessarily collusive for two parties to pursue their claims together,[67] MACO is correct that under *Abby/Land*, it is unlawful for two parties to work together to create a completely contrived claim so they can obtain a judgment against another party.[68] But here, MACO is not entitled to summary judgment on its collusion defense because there are issues of material fact as to whether the LMP Trust's demand is an actual claim against Monroe under which it is actually seeking a payment from Monroe or is an entirely contrived claim to obtain a judgment against MACO. *Inter alia*, this Court will need to assess Monroe's and McGovern's credibility to make its finding on this issue. This Court has previously ruled, "Summary judgment is improper where the credibility of a witness is crucial to decisions of material fact."[69] Accordingly, MACO is not entitled to summary judgment on its collusion defense.

¶ 49 For the foregoing reasons, MACO's Motion for Summary Judgment is **denied**.

DATED this 19th day of June, 2020.

(SEAL)

DAVID M. SANDLER
JUDGE

c: Laurie Wallace, Allan McGarvey, and Ethan Welder
Norman H. Grosfield

Submitted: December 20, 2019

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[66] *See Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358 and *Moreau II*, 2018 MT 1, ¶ 21 (explaining that workers' compensation insurer was liable for medical benefits if the entity that paid the medical benefits "sued" the injured worker or his estate).

[67] *See, e.g., Abby/Land*, ¶ 51 (citation omitted) (explaining that while a negotiated settlement requires two parties to work together, it becomes collusive "when the purpose is to injure the interests of an absent or nonparticipating party, such as an insurer or a nonsettling defendant.").

[68] *See Abby/Land*, ¶¶ 41, 53, 56-60 (holding that while it is not fraudulent or collusive to enter into a stipulated judgment, Montana law does not allow a party to assert a "entirely contrived" claim against a second party so a judgment can be obtained against a third party).

[69] *Cole v. Mont. State Fund*, 2015 MTWCC 4, ¶ 19 (citation omitted).