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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA	
IN RE ASBESTOS LITIGATION,	Cause No. AC 17-0694
<i>Consolidated Cases</i>	PLAINTIFFS' MOTION IN LIMINE RE: CARD'S FINANCES AND RELATIONSHIP WITH ATTORNEYS AND BRIEF IN SUPPORT
	THIS DOCUMENT RELATES TO: <i>Barnes, et al. v. State of Montana, et al.</i> , Lincoln County Cause No. DV-16-111 Judge Matt Cuffe

Come now Plaintiffs, in accordance with the Court's scheduling order, and respectfully submit their motion *in limine* to prevent Defendants from arguing on the basis of, including any cross examination, or submitting testimony or evidence regarding, any financial or other alleged improper relationship between Plaintiffs' attorneys and Libby's CARD<sup>1</sup> Clinic or CARD Foundation, or regarding the finances of CARD Clinic or CARD Foundation.

The issues raised in this motion *in limine* are intended to be broadly applicable to all the parties before the Asbestos Claims Court. They are therefore appropriate for resolution here, rather than in the District Court at the trial of just these Plaintiffs' claims.

<sup>1</sup> Center for Asbestos Related Disease.

## INTRODUCTION

The CARD Clinic is a 501(c)(3) organization established in response to the nation's only EPA-declared Public Health Emergency. *See* CARD Clinic website, <http://www.libbyasbestos.org>; *see also* U.S. EPA, *Determination and Findings of Public Health Emergency for Libby Asbestos Site in Lincoln County, Montana*, June 17, 2009 (submitted as Exhibit 1 to Plaintiff's Brief in Support of Motion to Quash Subpoenas on CARD Clinic & CARD Foundation, filed May 25, 2018). Initially established as a department of Libby's St. John's Lutheran Hospital in 2000 to assist the asbestos screening work of the ATSDR,<sup>2</sup> CARD separated from the hospital and became a stand-alone entity in 2003. *See* CARD website. Its mission expanded from screening and medical treatment to also include research and outreach with community support services. *Id.* CARD continues to operate today as a primarily grant-funded clinic with over two dozen employees, with the mission of patient screening and care, and a secondary goal of assisting research from around the country. *Id.* It currently follows approximately 5,000 patients.

In 2008, similar to numerous hospitals throughout Montana, a separate non-profit foundation was created to support the CARD Clinic. *See* CARD Foundation website, <http://www.donatecardfoundation.org>. The CARD Foundation's mission is to:

1. Raise support to fund the healthcare, research, and outreach needs of CARD.
2. Continue to host the BIG SKY BASH concert event . . .
3. Fund and grow an endowment.
4. Create partnerships with other local and national healthcare and research foundations.

*Id.* Both the CARD Clinic and CARD Foundation are operated by volunteer community boards of directors. Together, they serve a critical medical and social services role in Lincoln County, a rural community with an undisputed history of tragic asbestos contamination and illness.

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<sup>2</sup> Agency for Toxic Substances and Disease Registry.

This Court is well aware that the majority of claimants before this Court have been seen at and continue to treat with the CARD Clinic. The Court is equally aware that almost all of these claimants are represented by this law firm (“MHSL”) or the Kovacich Snipes law firm (“KS”).

BNSF has repeatedly raised as an issue the fact that MHSL and one of its founding partners donated money to the CARD Foundation. BNSF has repeatedly raised as an issue that MHSL and its attorneys have an alleged special relationship with the CARD Clinic. Despite this Court allowing BNSF considerable latitude in its attempts to insinuate from the facts improper conduct by MHSL (and more broadly against all persons associated with CARD), BNSF chose not to comply with the Court ordered deadline to file a motion to disqualify MHSL or KS. Nevertheless, it appears that BNSF will still try to introduce into the trial of this matter evidence regarding CARD and/or MHSL which is irrelevant, immaterial, or unfairly prejudicial.

In that regard, it should be noted that the parties and this Court (together with the Nineteenth Judicial District Court, before whom trial proceedings will occur) are preparing to try the asbestos-related injury cases of three individual Plaintiffs: Tracie Barnes, Gerrie Flores, and Rhonda Braaten.<sup>3</sup> None intend to call either Dr. Black or other CARD staff as witnesses at trial to prove their case in chief. In this context, BNSF’s expected efforts against CARD must be constrained.

Since Plaintiffs have repeatedly stated on the record that Dr. Black from the CARD Clinic will not be called to testify in this trial, Plaintiffs have therefore not disclosed any CARD Clinic witnesses or doctors to offer opinions in this case. Additionally, Plaintiffs have disclosed no witnesses or doctors from Mount Sinai. Despite Plaintiffs’ statements on the record that they will not rely on CARD Clinic witnesses in this case, BNSF has filed expert disclosures

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<sup>3</sup> Mrs. Braaten’s case is pursued through her husband, the Personal Representative of her estate, Kenneth Braaten.

manifesting its intent to inject the irrelevant issues of donations to the CARD Foundation, and more generally CARD's financial transactions with several entities, including Mount Sinai and a local Libby machine shop owned by one of the CARD Foundation's Board members.<sup>4</sup>

BNSF efforts to introduce evidence regarding CARD and CARD's finances are irrelevant and ultimately improper pursuant to well established principles of Montana law, as are any effort to introduce evidence against Plaintiffs' counsel and its relationship, financial or otherwise, with CARD. As set forth herein, Plaintiffs seek an order *in limine* to preclude such argument or evidence by Defendants.

### APPLICABLE STANDARDS

A motion *in limine* is a "procedural device[] to obtain an early and preliminary ruling on the admissibility of evidence." *Speaks v. Mazda Motor Corp.*, 118 F.Supp.3d 1212, 1217 (D. Mont. 2015); *see also Hunt v. K-Mart Corp.*, 1999 MT 125, ¶ 11, 294 Mont. 444, 981 P.2d 275 ("A motion *in limine* is a request for guidance by the court regarding an evidentiary question, which the court may provide at its discretion to aid the parties in formulating trial strategy."). Its purpose is "to prevent the introduction of evidence which is irrelevant, immaterial, or unfairly prejudicial." *Cooper v. Hanson*, 2010 MT 113, ¶ 38, 356 Mont. 309, 234 P.3d 59. The Montana Supreme Court further recognizes that counsel may want to avoid objecting to improper arguments in front of the jury, as such objections only underscore the inappropriate points made by opposing counsel. *See State v. Ankeny*, 2010 MT 224, ¶ 38, 358 Mont. 32, 243 P.3d 391 (citing *Cooper*, ¶ 38). It has "historically encouraged the filing of motions *in limine* for precisely this reason." *Id.*

This Court has recognized its need to "sit on motions that affect broad categories of plaintiffs, or defendants, or whose resolution will be important for trial or settlement purposes." Asbestos Claims Court Hearing, January 31, 2018, 84:19-22.

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<sup>4</sup> Attached hereto as Exhibit 1 is the Expert Disclosure of forensic accountant Tracy L. Coenen.

Here, BNSF's status as a seasoned and sophisticated corporate litigant, with an established "pattern of practice that relies on misconduct to prevail in court," further justifies and requires that this Court address the evidence at issue and define prior to trial the limits regarding BNSF's intended use of CARD finances and attorney evidence. *See Anderson v. BNSF*, 2015 MT 240, ¶¶ 84-87, 380 Mont. 319, 354 P.3d 1248 (Wheat, J., concurring) (citing *Spotted Horse v. BNSF*, 2015 MT 148, ¶¶ 23-27, 379 Mont. 314, 350 P. 3d 52).

## ARGUMENT

### I. **Evidence regarding CARD finances or any relationship with attorneys is not relevant and should therefore be excluded.**

Plaintiffs have brought claims against BNSF based on their exposure to asbestos-contaminated vermiculite hauled through and escaping from BNSF properties in Libby for many decades. All three Plaintiffs have serious asbestos-related disease, marked by substantial lung impairment, cancer, and/or death. Plaintiffs have the burden of proving the elements of their claims. This includes establishing specifically the existence and severity of the respective asbestos injury that each alleges, and BNSF's role in causing such injury. Plaintiffs are on record that they intend to carry their burden without relying upon witnesses or opinions from CARD.

Montana Rules of Evidence Rule 401 provides:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

"Evidence which is not relevant is not admissible." M.R. Evid. 402.

In resolving Plaintiffs' claims against BNSF, no evidence of CARD finances or any relationship or donations between CARD and attorneys is relevant to the issues in this case. CARD's finances and any attorney relationships do not bear upon the existence of any element

of the Plaintiffs' claims. The evidence and argument at issue here and on which BNSF intends to rely addresses only BNSF's alleged credibility and bias concerns *against CARD*.<sup>5</sup> However, since Plaintiffs will prove the existence and cause of the respective asbestos-related injuries that they allege without relying upon CARD witnesses, no potential evidence *bearing upon the credibility of witnesses from CARD* is relevant, and therefore it is inadmissible.

A. A plaintiff's initial diagnosis from CARD is not sufficient basis to create a relevant issue of CARD's credibility.

Plaintiffs bear the burden to prove their alleged asbestos related medical conditions. That burden does not inherently demand that they present evidence of particular records or treatment from CARD. For example, while BNSF has made well known its dispute over CARD's initial diagnoses of Libby Claimants, these three Plaintiffs do not rely upon having been first diagnosed with an asbestos-related condition years ago, be it at CARD or elsewhere.<sup>6</sup> Instead, Plaintiffs' burden and evidence relates to their current alleged condition. As a matter of both fact and law, there is simply no issue in controversy related to these Plaintiffs' initial diagnosis made by CARD. Accordingly, broad allegations about donations from Plaintiffs' attorneys or any alleged special relationship with CARD's has no relevance in these particular Plaintiffs' cases.

The only relevance that an initial diagnosis might have here would be if BNSF wished to raise a statute of limitations defense. BNSF failed to file a motion for summary judgment on the running of the statute for any of these three Plaintiffs, and the time for filing such motions has

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<sup>5</sup> BNSF's motives to impugn Plaintiffs' counsel through evidence of their financial contributions to, or a particular relationship with CARD are likewise transparent. That said, having elected not to pursue the one mechanism for potential relief offered by the Court in a timely fashion, *see* Court's September 18, 2018, Order (denying BNSF's motion for additional discovery and requiring any Motion for Disqualification to be filed by September 21, 2018), BNSF cannot continue to inject evidence directed at MHSL, and no additional motion *in limine* should be necessary.

<sup>6</sup> The Court's Deferred Docket necessarily means that any plaintiffs' claims that advance on the Active Docket will depend on threshold medical evidence that goes beyond the initial diagnosis of mild or normal disease.

passed. Moreover, that defense must be premised upon the alleged diagnosis, i.e. notice of disease triggering the accrual of a claim, being legitimate enough to support a claim that a plaintiff should have timely pursued. Assuming *arguendo* such a scenario, BNSF cannot simultaneously argue that (a) CARD's diagnosis of the Plaintiff's claim was sufficient to cause their claim to accrue, yet (b) such diagnosis must be rejected because that diagnosis is not credible. In the context of this motion, it is even easier to see that BNSF cannot initiate a statute of limitations defense for the purpose of introducing a credibility issue regarding an initial diagnosis, which BNSF would at the same time be arguing must be rejected because that same diagnosis is allegedly not credible.

In sum, BNSF has not pursued a statute of a limitations defense, but even if it had, CARD's credibility has no place as a relevant issue in a potential statute of limitations analysis. Simply stated, BNSF cannot inject CARD's credibility as a relevant issue in this case via the initial diagnosis. Evidence in this scenario of CARD's finances or its relationship with attorneys is properly excluded *in limine*.

B. A plaintiff having been treated at CARD is not a sufficient basis to create a relevant issue of CARD's credibility.

Medical providers and experts may have reviewed or may reference CARD medical records in offering their opinions in this case. That does not make CARD's credibility a proper cross examination subject. Rule 401, M.R. Evid., identifies "evidence bearing upon the credibility of a witness"<sup>7</sup> as potentially relevant evidence. Likewise, § 26-1-302(3), MCA, separately provides that a party may employ evidence regarding "bias of the witness" when attempting to challenge the testimony of a witness. There is no basis for a party to employ evidence of bias in attacking the truth or credibility of a medical record. If BNSF or any party

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<sup>7</sup> Emphasis is added. Hereinafter, all emphasis is added unless otherwise noted.

wishes to challenge the validity or foundation of what may be reported in a particular medical record, it (a) must rely on other extrinsic evidence or witnesses to make that challenge, and (b) cannot simply resort to broad evidence of alleged bias by the medical provider.

Again, Plaintiffs here will not be calling CARD witnesses to prove the elements of their claims. BNSF should not be allowed to attack a witness, who is not part of CARD, simply because that witness may have reviewed a medical record from CARD. If BNSF wishes to introduce evidence of credibility or bias of a non-CARD witness pursuant to M.R. Evid., Rule 401 or § 26-1-302(3), MCA, it is properly limited to the evidence that bears upon that witness's credibility. CARD's finances or CARD's relationship with attorneys would not be among that permissible evidence of any non-CARD witness.

C. BNSF cannot call CARD witnesses for the sole purpose of generating an attack on the overall credibility and bias of CARD.

Rule 402, M.R. Evid., prevents the admission of evidence that is not relevant. Evidence of credibility or bias becomes relevant only after a witness introduces evidence that is recognized as relevant by the rules and the facts of this case. There is simply no justification or grounds to generate a credibility issue and introduce evidence regarding the biased testimony of a witness that has not first been properly put before the Court. Accordingly, it goes without saying that BNSF cannot manufacture a platform for its desired attack on CARD by calling upon and attacking the credibility of its "own" straw man CARD witness.

As a threshold matter, should BNSF wish to call CARD witnesses, it is important to note that it has failed to disclose any expert opinions that BNSF intends to offer through them. Testimony that any potential CARD witness might offer must therefore be limited to the history of and records regarding their treatment of Plaintiffs. Also, BNSF cannot simply call a potential CARD witness and immediately challenge their credibility. The witnesses would first need to testify specifically regarding matters that BNSF intends to dispute, in part through a challenge to

their credibility.<sup>8</sup> Because any CARD witness is confined to testimony regarding the content of their care and records for Plaintiffs Barnes, Flores, or Braaten, any effort by BNSF to call CARD witnesses as its own defense witnesses would obviously be nothing more than an attempted trojan horse for BNSF to attack CARD, rather than the given limited medical finding about which the witness would have been permitted to testify.

**II. Even if CARD’s credibility is deemed relevant regarding medical evidence in Plaintiffs’ case, the evidence at issue should be excluded pursuant to M. R. Evid. Rule 403.**

Montana Rules of Evidence Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, there can be no doubt that the “evidence” on which BNSF would rely is highly charged and carries the danger of **unfair prejudice** and **misleading the jury**. This Court oversaw a hearing in September where the sensitivity of accusations regarding this issue was on full display. In front of a jury, not only would this evidence be grossly and unfairly prejudicial to these Plaintiffs, it would carry great risk of confusion. Issues like ‘referral’ that have a technical meaning within the context of professional conduct would no doubt be interpreted disparately and wrongly by jurors without the necessary background and experience. This is likely one of the primary reasons why BNSF continues still to pursue its use through expert testimony, and equally why Rule 403 exists: prejudicial evidence like this has the capacity to be very powerful. Unfortunately, BNSF seeks to employ that power unfairly to tilt the jury and these proceedings away from the real issues in fairly litigating Plaintiffs’ claims.

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<sup>8</sup> However, evidence of donations to the CARD Foundation or any alleged relationship with the CARD Clinic providers has no bearing on a CARD Clinic witness’s “character for truthfulness.” See M.R. Evid. 608.

As stated above, this is a case involving three Libby residents who developed severe asbestos disease. It does not involve the diseases that other people in Libby incurred. BNSF would for obvious reasons seek to have the jury decide this case, involving Plaintiffs Barnes, Flores, and Braaten, by improperly focusing on the population whose exposures and diseases have not developed into impaired injuries, claiming those are a product of CARD's alleged financial interest or relationship with Plaintiffs' counsel. However, the fact remains that these Plaintiffs' disease and claims are NOT those unimpaired cases. This is demonstrated both in part by the severity of Plaintiffs' diseases (mesothelioma, lung cancer, and severe ARD), and in part by the fact that their cases/burden will rise or fall without relying on CARD witnesses.

The only way that these Plaintiffs can be afforded their right to a fair trial in which their medical condition is assessed by the jury is by an *in limine* order that prevents BNSF from arguing such prejudicial evidence. Even assuming *arguendo* it was relevant to some claim or defense, its minimal probative value is substantially outweighed by the dangers of prejudicing and misleading the jury, and should be excluded under Rule 403, M.R. Evid.

Finally, this evidence would inject unnecessary evidence and lead to substantial delay. As demonstrated in part by the prior proceedings before this Court, a virtual mini-trial would be required to defend against the breadth of BNSF's allegations. The Court has denied BNSF's desire for additional discovery into the matter, and the fact remains that there is no evidence to support BNSF's desire to connect charitable donations made by MHSL or one of its founding attorneys to the CARD Foundation with the CARD Clinic's diagnostic practices or any allegedly related motivations.

This motion *in limine* is further necessary to mark a clear line regarding the argument, evidence, and conduct that BNSF cannot engage. Attached as Exhibit 2 is a portion of the trial transcript from *Daley v. BNSF*, Montana Eleventh Judicial District Court, Cause No. DV-05-

882(C), which highlights the kind of conduct and comments from BNSF Counsel that Plaintiffs expect would also be addressed and prevented by this motion as irrelevant, inappropriately intended to mislead the jury, and prejudicial:

905:6 (Chad Knight) All right. So, Dr. Whitehouse, you  
7 and I have met before correct?  
8 (Dr. Whitehouse) Yes.

...  
13 (Chad Knight) And you got a little sore at me  
14 because I took too long and ruined your golf  
15 match with Mr. Heberling, didn't I?  
16 (Dr. Whitehouse) No. You did not follow the promise  
17 that was made previously.

...  
24 (Chad Knight) You're not still sore at me, are you?  
25 (Dr. Whitehouse) Yes, I am.

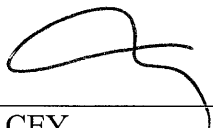
Without such an *in limine* ruling, BNSF will continue to push up to and past the point of the parties' right to a fair trial that this Court.

### CONCLUSION

For all of the foregoing reasons, Plaintiffs request that their motion *in limine* to prevent Defendants from arguing on the basis of, including any cross examination, or submitting testimony or evidence regarding, any financial or other alleged improper relationship between Plaintiffs' attorneys and Libby's CARD Clinic or CARD Foundation, or regarding the finances of CARD or CARD Foundation.

DATED this 24 day of November 2018.

McGARVEY, HEBERLING, SULLIVAN  
& LACEY, P.C.

By:   
\_\_\_\_\_  
JOHN F. LACEY  
ROGER SULLIVAN  
ETHAN A. WELDER  
JINNIFER JERESEK MARIMAN  
*Attorneys for MHSI Plaintiffs*

# **EXHIBIT 1**

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August 27, 2018

Jason E. Pepe, Esq.  
Knight Nicastro LLC  
519 Southwest Boulevard  
Kansas City, MO 64108

Re: BNSF – Libby

Dear Mr. Pepe:

You asked me to analyze financial documents in the above matter and identify funds that may have gone between Center for Asbestos Related Disease (CARD), Center for Asbestos Related Disease Foundation (Foundation), attorneys involved in the Libby litigation, Mt. Sinai Health System in New York (Mt. Sinai), and other involved parties.

**Documents**

I utilized the following documents in performing my analysis:

- CARD and Foundation bank statements and QuickBooks reconciliation reports (A detailed document inventory is attached as **Exhibit A.**)
- CARD payroll reports, customer balance reports, and vendor balance reports from QuickBooks
- CARD and Foundation income tax returns
- CARD financial statements
- Foundation general ledger

310 East Buffalo Street Milwaukee, WI 53202  
414.727.2361 Milwaukee 312.498.3661 Chicago  
www.sequenceinc.com

EXHIBIT 1 C  
BARNES, ET AL. V. BNSF RAILWAY  
EXPERT WITNESS DISCLOSURE

- July 2018 deposition transcripts and exhibits for Dr. Brad Black, Ashley Day, Kayla Friss, Kerensa Hanley, Tracy McNew, Nancy St. Jean, Leroy Thom, and Dusti Thompson
- August 26, 2018 report by Philip Segal of Charles Griffin Intelligence (Segal Report)

## Analysis

I performed a detailed analysis of the bank statements, checks, deposit slips, and QuickBooks reconciliation reports in order to determine sources and uses of funds. The documents provided to me included January 2015 through May 2018.

I identified funds flowing between CARD and the following parties:

1. McGarvey Heberling – CARD provided reports detailing “customer” balances, including the balance for the McGarvey Heberling law firm. According to these records, between 2008 and 2018, invoices totaling \$115,646 for medical records were issued to McGarvey, and payments totaling \$112,484 were received. I was able to verify the payments made by the McGarvey firm and deposited by CARD between 2015 and 2018, which noted “McGarvey” on the deposit slips. Between 2015 and 2018, the invoices totaled \$67,454 and the payments totaled \$65,253. The data from the CARD reports for 2015 through 2018 is detailed on **Exhibit B** and the deposit slips are attached as **Exhibit C**.
2. Mt. Sinai – My analysis of the bank statements and related documentation revealed a number of deposits of funds from Mt. Sinai as well as payments from CARD to Mt. Sinai. The deposits occurred in 2015 and totaled \$163,228. The payments occurred between 2015 and 2018, and totaled \$114,475. These items are detailed on **Exhibit D**. Copies of the deposit slips are attached as **Exhibit E**, and copies of the checks are attached as **Exhibit F**.
3. Noridian – It is my understanding that Medicare uses Noridian Healthcare Solutions (Noridian) to run the Medicare Pilot Program for Asbestos Related Disease. There are a number of deposits to the CARD bank account that appear to be for claims related to this program. There are a number of checks deposited with the notation “Noridian” on the deposit slips which do not appear to be related to claims. Between 2015 and mid-2018, these deposits totaled \$926,000. The items are detailed on **Exhibit G**, and copies of the deposit slips are attached as **Exhibit H**.
4. Montana Machine & Fabrication LLC – This company was formed by Leroy Thom, who is a member of the boards of directors of both CARD and the Foundation. Between 2015 and 2018, Montana Machine & Fabrication was paid \$15,472 by CARD. The payments are detailed on **Exhibit I**, and copies of the checks are attached as **Exhibit J**.
5. Jaime Szeinuk, MD – Dr. Szeinuk is affiliated with Mt. Sinai, and was paid \$80,000 by CARD between 2015 and 2018. The details of these payments are on **Exhibit K**, and copies of the checks are attached as **Exhibit L**.

I reviewed the Segal Report to identify other important parties. I did not find any other significant transactions involving people or organizations identified in that report.

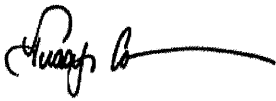
It has been noted that the Foundation reported contributions received from John Heberling. I verified that the Foundation reported the following contributions from Mr. Heberling, which total \$55,000:

2014	\$40,000
2015	\$ 5,000
2016	\$10,000

The relevant pages from the tax filings of the Foundation are attached as **Exhibit M**. I was unable to find these contributions in the bank documents provided to me, and I did not find any additional contributions from Mr. Heberling in the bank documents.

Please contact me if you have any questions or require additional analysis of any issues relative to this matter.

Very truly yours,



Tracy L. Coenen, CPA, CFF

# **EXHIBIT 2**

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MONTANA ELEVENTH JUDICIAL DISTRICT COURT  
FLATHEAD COUNTY

Cause No. DV-05-882 (C)

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KENNETH R. DALEY,

Plaintiff,

vs.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,  
a Delaware For-Profit Corporation; GREAT  
NORTHERN RAILWAY COMPANY, a Foreign For-Profit  
Corporation, and DOES A-Z, inclusive,

Defendants.

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PARTIAL TRANSCRIPT OF PRETRIAL  
AND JURY TRIAL PROCEEDINGS  
(Excludes Transcript of Jury Selection)

HELD BEFORE THE HONORABLE HEIDI J. ULBRICHT

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Taken at Flathead County Justice Center  
920 South Main ~ Kalispell, Montana 59901  
Reported by Nancy Skurvid, RPR

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1 MR. KNIGHT: 449, 485, 486, 487,  
2 488. And then 413 and 446 we move to admit, I  
3 understand, over Plaintiff's objection.

4 THE COURT: So on 413 and 446 the  
5 Court will admit over objection. And then for  
6 Plaintiff, do you agree these are stipulated  
7 defense exhibits?

8 MR. LACEY: We do.

9 THE COURT: Okay. And so  
10 defense -- Sara, do you need me to go through  
11 them individually?

12 THE CLERK: I've got them.

13 THE COURT: The exhibits are  
14 admitted.

15 (Defendants' Exhibit Nos. 365, 367,  
16 370, 374, 378, 379, 381, 385, 389,  
17 391, 392, 393, 394, 395, 396, 398,  
18 399, 400, 404, 406, 411, 412, 413,  
19 432, 446, 449, 482, 485, 486, 487,  
20 and 488 received into evidence.  
21 Defendant's Exhibit No. 387

22 previously admitted into evidence.)

23 THE COURT: You may proceed.

24 MR. KNIGHT: Thank you, Your  
25 Honor.

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1 CROSS-EXAMINATION

2 BY MR. KNIGHT:

3 Q Good afternoon, everyone. Don't let  
4 all those exhibits get you scared, we're not  
5 gonna be here for like three days, I promise.

6 All right. So Dr. Whitehouse, you  
7 and I have met before, correct?

8 A Yes.

9 Q Good to see you again. I think last  
10 time we met was at your deposition only about  
11 16 days ago, right?

12 A Correct.

13 Q And you got a little sore at me  
14 because I took too long and ruined your golf  
15 match with Mr. Heberling, didn't I?

16 A No. You did not follow the promise  
17 that was made previously.

18 Q I see. All right. And last night,  
19 when you and Mr. Welder were telling the jury  
20 that I was misstating all the evidence, I  
21 thought maybe you were still sore at me.  
22 You're not still sore at me, right?

23 A What's that?

24 Q You're not still sore at me, are you?

25 A Yes, I am.

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1 Q You still are. Oh, okay. Well,  
2 we'll do our best --

3 A If you want to call me biased, you  
4 can.

5 Q We'll do our best to get past that.

6 A But I will tell you the truth.

7 Q All right, fair enough.

8 So we're gonna get to what you and  
9 Mr. Welder were saying about me last night  
10 here pretty quick, but let's start with this.  
11 You already mentioned to this jury yesterday  
12 that you've testified in about 10 to 20 cases  
13 over the last number of years, always for the  
14 plaintiff in asbestos cases, correct?

15 A Yes.

16 Q All right. And how many of those 10  
17 to 20 cases where you've testified was it with  
18 one of the firms here?

19 A With Mr. --

20 Q Mr. Heberling's firm or Mr. Towe's  
21 firm.

22 A Oh, probably all except three that I  
23 can think of.

24 Q Okay. And, of course, you know as an  
25 expert, you know, you get involved in a lot

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1 more cases than you testify in, right? Like a  
2 lot of cases go away, maybe you get identified  
3 as an expert, you might give a deposition, the  
4 case might settle, might get dismissed, those  
5 kinds of things; correct?

6 A No, I don't think so. I haven't had  
7 that experience.

8 Q You've testified in every single case  
9 you've been involved in?

10 A I have not been involved -- I have  
11 not been asked to do a lot of cases.

12 Q How many cases have you been involved  
13 in over the years where you didn't give  
14 testimony?

15 A I think probably none.

16 Q Probably none, okay. So you're lucky  
17 enough to always make it to court?

18 A Always what?

19 Q Always make it to court.

20 A Pretty much so. If I'm required in  
21 court, I will, but I -- I'm a bit selective  
22 also.

23 Q I see. All right. So you -- you do  
24 a lot of work apparently with the firms here,  
25 you mentioned that. And you actually also

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1 mentioned that you published some papers, and  
2 you have over the years; correct?

3 A Yes.

4 Q Okay. And these same plaintiff firms  
5 have funded these papers you've published,  
6 correct?

7 A Oh, I have -- first of all is that  
8 what I do with the firms here is independent,  
9 okay. I have a choice. I'm not on their  
10 payroll or anything else, okay. Sometimes I  
11 get paid for what I do, mostly when I'm in  
12 trial or something like that. But otherwise,  
13 no.

14 Q Do you recall telling me in your  
15 deposition, sir, that your paper that you are  
16 about to submit for publication was funded by  
17 attorneys; correct?

18 A By whom?

19 Q By attorneys. By plaintiff  
20 attorneys.

21 A Which paper are you talking about?

22 Q I'll pull out your deposition if that  
23 will help you, sir.

24 MR. KNIGHT: May I approach, Your  
25 Honor?

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1 Q Okay. So in this particular case you  
2 said, when I took your deposition two weeks  
3 ago, that you spent about 20 to 30 hours on  
4 this case; is that right?

5 A Probably.

6 Q Okay. But you had only received a  
7 binder of medical records from the attorneys  
8 about a month ago, correct? Or at least a  
9 month prior to the deposition?

10 A Well, I had all the prior records on  
11 the patient.

12 Q Okay. But when you -- you just got  
13 this big bulk of medical records and materials  
14 a month before your deposition which was in  
15 June, on June 15th, right?

16 A I believe so.

17 Q Okay. But we already had all your  
18 opinions in your expert report, where you were  
19 laying out your expert opinions about all the  
20 asbestos-related disease that Mr. Daley has,  
21 and all the disability that he has, and the  
22 bad prognosis that he has, and that it was all  
23 my client's fault, before you had even gotten  
24 that big binder of documents; isn't that  
25 right?

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1 THE COURT: You may.

2 BY MR. KNIGHT:

3 Q All right, sir. And up here we're  
4 talking about "Did you receive a grant or  
5 funding to put together that paper?"

6 And you say, "Not really."

7 Correct?

8 A Right.

9 Q And I'm just gonna -- for time  
10 purposes, I'm gonna skip back down. "Is it  
11 fair to say that the CARD clinic funded that  
12 paper?"

13 "No, the CARD clinic didn't fund it.  
14 No. If anybody funded it, the attorneys did."  
15 Did I get that right, sir?

16 A Yeah, but it was very indirectly.

17 Q Indirectly?

18 A From things that I'd done previously.  
19 Which paper are you talking about?

20 Q We can look back. I think it's the  
21 one that you said was being submitted  
22 recently. Or maybe it's prepared -- it's the  
23 one you were working on.

24 A I haven't submitted a paper for quite  
25 a while.

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1 THE COURT: One moment.

2 THE WITNESS: That's not true.

3 THE COURT: Mr. Whitehouse, one  
4 moment.

5 MR. WELDER: Objection, Your  
6 Honor, misstates the record. We rehabbed him  
7 on that point.

8 (Court reporter requests  
9 clarification.)

10 MR. WELDER: During the  
11 deposition we rehabbed Dr. Whitehouse on that  
12 point. Page 91 to 92.

13 MR. KNIGHT: Your Honor, I'm just  
14 asking the question. He can answer it "yes"  
15 or "no."

16 THE COURT: And I --

17 MR. WELDER: Well then,  
18 objection, misstates prior testimony.

19 THE COURT: And you'll have an  
20 opportunity to redirect on that issue.  
21 Overruled.

22 BY MR. KNIGHT:

23 Q Isn't that correct, sir?

24 A What is that?

25 Q You had gotten those medical

## CERTIFICATE OF SERVICE

I, John F. Lacey, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 11-02-2018:

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