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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

<p>IN RE ASBESTOS LITIGATION, <i>Consolidated Cases</i></p>	<p>Cause No. AC 17-0694 PLAINTIFFS' MOTIONS <i>IN LIMINE</i> RE: BNSF'S EXPERTS AND BRIEF IN SUPPORT Applicable To: <i>Barnes, et al. v. State of Montana, et al,</i> Lincoln County Cause No. DV-16-111</p>
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MOTION

Come now Plaintiffs, and in accordance with the Court's scheduling order, respectfully submit the following motion *in limine* to address numerous aspects of the expert testimony that BNSF has represented that it intends to introduce. Plaintiffs' motion seeks to prevent BNSF and its experts from testifying or arguing about the topics set forth herein.

The issues raised in this motion *in limine* are intended to be broadly applicable to all cases involving BNSF 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.

APPLICABLE STANDARD

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. PLAINTIFFS' MOTIONS *IN LIMINE* RE: BNSF'S EXPERTS AND BRIEF IN SUPPORT

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. 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. *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).

I. BNSF’s undisclosed opinions of Dr. Graham, Dr. Sicilia, Dr. Slomovitz, Mel Burda and Don Cleveland.

In its expert disclosure, BNSF identifies Dr. Michael Graham as an expert in this case. BNSF includes a report that Dr. Graham authored regarding Plaintiff Gerrie Flores. At issue here is BNSF’s failure to make any disclosure with respect to Plaintiff Tracie Barnes. Rather, BNSF unilaterally states:

Dr. Graham will also provide a report regarding Tracie Barnes which will be provided immediately upon receipt.

Similarly, BNSF provides a brief written disclosure for, Dr. David Sicilia and Dr. Brian Slimovitz, but unilaterally states that Dr. Sicilia and Dr. Slimovitz:

Will testify in a manner consistent with the findings and conclusions documented in his completed report, which will be provided immediately upon receipt. (Emphasis added.)

BNSF filed a motion seeking an extension as it applied to Dr. Graham, which Plaintiffs have opposed. However, BNSF neither filed any such motion nor articulated any factual basis for its failure to timely disclose reports from Dr. Sicilia (historian) and Dr. Slimovitz (ObGyn relying on a timely disclosed pathology report of Dr. Robert Young).

This Court initially ordered that by August 31, 2018, “the names and addresses of the parties’ expert witnesses, together with the information called for in Mont. R. Civ. P. Rule 26, must be furnished to all opposing parties and filed with the Court.”¹ Upon BNSF’s request, the Court extended that deadline 60 days to October 26, 2018. The Montana Supreme Court “has, on a number of occasions, affirmed the authority of a district court to exclude expert testimony.” *Nelson v. Nelson*, 2005 MT 263, ¶ 32, 329 Mont. 85, 93, 122 P.3d 1196, 1202 (citing *Seal v. Woodrows Pharmacy*, 1999 MT 247, 296 Mont. 197, 988 P.2d 1230 (excluding expert opinions offered in violation of the District Court’s scheduling order and Rule 26(b)(4)(A)(i), M.R.Civ.P.)).

For BNSF to now attempt to unilaterally extend the Court’s deadline for its disclosure of expert opinions is not proper and prejudices Plaintiffs. In contrast, Plaintiffs’ expert opinions were fully disclosed to BNSF on October 26, 2018. Aside from BNSF’s disrespect for the Court’s order and scheduling needs, allowing the untimely disclosure of BNSF’s experts’ reports give BNSF the

¹ Contrary to the Court’s order, BNSF did not file its Expert Disclosures with the Court. BNSF only filed a Notice of Service that it served those disclosures on Plaintiffs.

benefit of seeing Plaintiffs' expert disclosures before issuing their reports. Additionally, BNSF's delay puts Plaintiffs in the position of not being able to file any motions *in limine* regarding these proposed late-filed reports until after the November 2, 2018 deadline for such motions. In that regard, Plaintiffs anticipate conducting expert depositions in advance of the November 29, 2018, discovery deadline, the preparation for which will be foreshortened should the Court allow BNSF to proceed with late-filed expert reports.

While district courts have broad discretion in determining what evidence will be allowed at trial, that discretion nonetheless is not unlimited and must be exercised in such a manner as to afford a fair trial to all parties. *Hulse v. State, Dept. of Justice*, 1998 MT 108, ¶ 15, 289 Mont. 1, 961 P.2d 75. Accordingly, BNSF's experts should be limited to those opinions which have been timely disclosed. Plaintiffs respectfully request the Court enter an order *in limine* precluding additional opinions and factual support offered after the already extended expert disclosure deadline.

Similarly, BNSF disclosed Mel Burda and Don Cleveland as "non-retained expert witnesses." However, aside from providing their limited contact information, BNSF provided no additional information, opinions, or bases of opinions. Mr. Burda and Mr. Cleveland are simply named. That disclosure does not provide the information called for in Mont. R. Civ. P. Rule 26. To the extent Mr. Burda or Mr. Cleveland are called to testify by BNSF and they attempt to offer expert opinions, Plaintiffs respectfully request the Court enter an order *in limine* precluding such opinions.

II. Dr. David Sicilia's opinions/comments regarding employment and economic development benefits due to BNSF's vermiculite activities.

BNSF has disclosed that Dr. David Sicilia “will provide testimony at trial regarding the following topics”:

...The Zonolite mining and processing operations quickly became one of Libby's leading employers.” . . . As demand for vermiculite for insulation, construction materials, soil conditioning, and other applications grew, Grace expanded the Zonolite operations in and around Libby to become on the world's largest vermiculite production facility, employing hundreds of local residents. . . .

* * *

The Great Northern Railway (GN) under the visionary leadership of James J. Hill brought settlement and commerce to the Northwestern region of the United State [sic] when it operated as the only profitable transcontinental railroad among the nations' four. When one of its branches passed through Libby, the connection provided enormous economic benefits and helped establish Libby as a viable community.

BNSF has stated Dr. Sicilia will be authoring a report at some point in the future as well, that will contain additional opinions which will presumably contain similar improper statements (that undisclosed report is the subject of the motion *in limine* in Section I. herein).

However, at issue here are the disclosed statements of Dr. Sicilia quoted above regarding employment generated by BNSF's activities as well as “enormous economic benefits” to the community related thereto. For reasons explained in Section 1. of the separately filed *Motion in Limine Re: Various Evidentiary Issues* (which seeks exclusion of “Golden Rule” evidence and argument regarding economic development, employment, etc. resulting from BNSF's activities), such comments are inadmissible. Such comments, evidence and arguments improperly appeal to the passions of the jury, present a danger of unfair prejudice, may confuse the issues, and may mislead the jury. *Daley v. Burlington N. Santa Fe Ry. Co.*, 2018 MT 197, ¶¶ 30-31, 392 Mont.

311, 425 P.3d 669; Mont. R. Evid. Rule 403. Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding such statements/evidence.

III. Dr. Kind's opinions derived from lack of evidence caused by BNSF's failure to conduct OSHA mandated testing.

Despite their knowledge of asbestos in the Libby Railyard dating back to at least the 1970's, prior to the EPA mandated cleanup of the Libby Railyard in 2001, BNSF failed to conduct any testing for asbestos required by OSHA and other safety standards. For reasons explained in Section 5 of the separately filed *Motion in Limine Re: Various Evidentiary Issues*, BNSF should not be able to imply, due to its lack of testing, that the Libby Railyard was somehow safe or not contaminated with asbestos.

As it applies to BNSF's expert disclosures, John Kind has offered industrial hygiene opinions where he applies the incorrect standard for causation (the subject of a separate motion *in limine* in Section VII. below). Important here, he opines that "specified dose[s]" must be applied to Plaintiffs' exposures so as to satisfy a "dose-response" of Plaintiffs' exposures to asbestos related disease. He goes so far as to opine that:

The importance of calculating the dose cannot be overstated; in the absence of calculating a dose, opinions regarding human health risk are absent any reasonable degree of scientific certainty . . .

* * *

Quantitative exposure measurement data may not always be available, and in certain cases it may only be possible to determine qualitatively whether or not an exposure may have taken place. A qualitative exposure assessment does not rely on quantitative [site- or situation-specific] data and therefore will not provide the level of information as quantitative assessments. ... A qualitative exposure assessment is therefore not useful for establishing causation or estimating an individual's lifetime health risks from exposures to a particular agent. (Kind Report, pp. 26, 29-30.)

However, the inability to calculate the very “dose” and a “quantitative exposure assessment,” the importance of which Dr. Kind opines “cannot be overstated,” has been impaired by BNSF’s failure to conduct any contemporaneous testing, as was required by OSHA and other standards of care of the time. Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding BNSF from benefitting from its failure to perform the mandated asbestos testing and preclude such statements, evidence, and opinions, such as those proposed to be offered by Dr. Kind.

IV. Dr. Kind’s opinions about BNSF’s knowledge of vermiculite.

BNSF has disclosed Dr. Kind as its expert to offer industrial hygiene opinions. In his report regarding Plaintiff Tracie Barnes, Dr. Kind states: “BNSF would not have reason to suspect that transport of vermiculite concentrate by rail would have had the potential to result in community exposures to asbestos.” *Id.*, p.12. However, that statement is not supported by the factual record. See Report of Julie Hart at ¶¶ 44-61, attached as Exhibit 71 to the *Second Affidavit of Roger Sullivan* citing documents dating back to the 1930’s. BNSF and Dr. Kind are well aware of BNSF’s knowledge of the potential asbestos exposures caused by BNSF’s transport of vermiculite. In fact, in *Watson v. BNSF*, Cascade County Cause No. ADV-10-0740, BNSF disclosed Dr. Kind’s opinions as contained in Dr. Kind’s September 16, 2016, report, which noted “placards placed on the vermiculite concentrate railcars by the W.R. Grace loading personnel, which state ‘Vermiculite concentrate may contain up to 1.0% Asbestiform Tremolite.’” Dr. Kind’s acknowledgement of that fact asserted on behalf of BNSF in 2016 directly refutes his current factual contention.

In that regard, it appears BNSF is attempting to elicit from Dr. Kind factually unsupported testimony similar to the testimony BNSF elicited from Dr. Kind on June 8, 2018 in *Wetsch v. BNSF*, U.S. District Montana Cause No. DV-32-2016-0001146-DS:

Mr. Knight: Q. All right. So based on the information that you reviewed, would there have been any reason for BNSF as a shipper to have anticipated that this product that was being tendered to it would have been hazardous back in that time period?

Mr. Kind: A. No.

* * *

Mr. Knight: Q. During this time frame, I mean anytime up to the 90's, was this product being labeled or marketed with any type of caution or warning that, hey, this might contain some asbestos or have some hazardous properties?

Mr. Kind: A. No. It was being put in homes all across the country as insulation.

Despite the documents evidencing BNSF's knowledge of asbestos in vermiculite dating back to the 1930's, documents evidencing BNSF's knowledge of asbestos in the Libby Railyard dating back to at least the 1970's, and Dr. Kind's prior acknowledgement of asbestos warnings on rail cars, BNSF elicited testimony from Dr. Kind that BNSF had no reason to be aware of hazards associated with the vermiculite and that there were no warnings that the vermiculite might contain asbestos. That testimony is false, presents a danger of unfair prejudice, confuses the issues, and will mislead the jury. Mont. R. Evid. Rules 402, 403. Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding such statements.

V. Dr. Haber's "opinions" regarding Tracie Barnes.

BNSF has disclosed Dr. Steven Haber to testify in general accord with his report. Attached to that disclosure is a report by Dr. Haber regarding Plaintiff Tracie Barnes. At issue here are the following alleged "opinions" Dr. Haber offers regarding Mr. Barnes, none of which are offered to a reasonable degree of medical probability:

Opinion: With regard to Mr. Barnes, I make the following findings and opinions:

- 1) While there are radiographic findings that could be consistent with asbestos-related pleural disease and asbestosis, the visible year-to-year progression is uncharacteristic of asbestosis in the

absence of intense occupational asbestos exposure, and would suggest an alternative diagnosis (ATS 2004).

- 2) Mr. Barnes has clinical findings that would suggest underlying rheumatoid arthritis, including radiographic changes and possible subcutaneous and pulmonary nodules. Rheumatoid arthritis is strongly associated with radiographic findings that can be indistinguishable from asbestos-related disease, including pleural plaquing, diffuse pleural thickening, and interstitial fibrosis. He worked for 6 years with exposure to silica dust, which is known to increase the risk for RA.
- 3) To the extent that he has asbestos-related disease, exposures from sources unrelated to the railroad, particularly from take-home exposure to raw ore from his father's work at the dry mill, or his own direct asbestos occupational exposures, would be most likely the causative sources.
- 4) Given the extensive pleural plaquing and diffuse pleural thickening present in this case, Dr. Black's claim of the presence of so-called lamellar pleural thickening is dubious.
- 5) To the extent he has asbestos-related disease, had Mr. Barnes gone for asbestos screening in 2010 as repeatedly advised by his physician, his x-ray would likely would have demonstrated at least pleural plaquing and he would have been diagnosed with asbestos disease.

Sincerely,

At a minimum, the opinions contained in paragraphs 1 and 2 are vague.² There is no indication these opinions are offered on a more probable than not basis, leaving Plaintiffs to guess as to whether these opinions will be presented at trial.

² Conversely, Dr. Haber's opinions regarding Plaintiff Gerrie Flores are alleged in a near absolute tone. Additionally, Dr. Haber includes the following language after listing his twelve (12) opinions:

These opinions have been made to a reasonable degree of medical probability. I reserve the right to amend or supplement my opinions based upon any new or additional information.

Sincerely,

In *Estate of Willson v. Addison*, 2011 MT 179, ¶ 18, 361 Mont. 269, 258 P.3d 410, the Montana Supreme Court stated:

Expert medical testimony must exhibit “reasonable medical certainty.” *Dallas v. Burlington Northern, Inc.*, 212 Mont. 514, 522–23, 689 P.2d 273, 277 (1984). Put another way, “we are striving for ... a probability rather than a possibility.” *Id.* at 523, 689 P.2d at 277. The “evidentiary standards are satisfied if medical testimony is based upon an opinion that it is ‘more likely than not.’”

“The ‘more likely than not’ standard assures that the expert testimony or opinion ‘does not represent mere conjecture, but rather is sufficiently probative to be reliable.’” *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 41, 365 Mont. 405, 282 P.3d 687.

Based on BNSF’s disclosures of Dr. Haber regarding Plaintiff Tracie Barnes, particularly opinions 1 and 2, (“could be consistent,” “would suggest,” etc.), it appears Dr. Haber will be offering opinions based on conjecture. Those opinions are not admissible. *Willson*, ¶ 18; *Ford*, ¶ 41. Plaintiffs respectfully request the Court enter an order *in limine* precluding such statements.

VI. Tracey Coenen’s “opinions” regarding CARD funding.

For reasons explained in Plaintiffs’ separate *Motion in Limine Re: CARD’s Finances and Relationships with Attorneys* there should be no evidence admitted regarding funds flowing between CARD and irrelevant entities. That is the sole subject of BNSF’s expert Tracy Coenen’s anticipated testimony. See **Exhibit A** – Tracy Coenen 8/27/18 Report. For that reason, Ms. Coenen’s testimony should not be allowed.

Additionally, Ms. Coenen offers no opinions in this matter. Mont. R. Evid. Rule 702 allows testimony by expert witnesses “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine fact in issue. . .” Ms. Coenen is not offering scientific, technical, or other specialized knowledge. Rather, she simply summarized

amounts contained in financial documents. For reasons explained in the separately filed *Motion in Limine Re: CARD's Finances and Relationships with Attorneys* as well as the fact M. Coenen is not offering any expert opinions, Plaintiffs respectfully request the Court enter an order *in limine* precluding Ms. Coenen's testimony.

VII. BNSF experts offering legal conclusions or legal standards.

BNSF has disclosed experts who intend to offer legal conclusions. Specifically, Dr. John Kind opines on the standard to prove legal causation. However, Dr. Kind is mistaken regarding the legal causation required here. Where there are allegations that the acts of more than one person combined to produce a single harm, each of the multiple acts or omissions is a cause of the harm if it was a substantial factor in bringing about the harm. *See Busta v. Columbus Hospital Corporation* (1996), 276 Mont. 342, 371, 916 P.2d 122, 139–40. It is absolutely forbidden for any expert to give opinions on legal conclusions. *See Hart-Anderson v. Hauck* (1988), 230 Mont. 63, 70, 748 P.2d 937, 941. Dr. Kind's opinions on the legal causation standard are improper. Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding such statements.

VIII. Disparaging comments by expert witnesses regarding opposing expert witnesses.

From experience in prior litigation with BNSF, BNSF and their experts have made disparaging comments regarding Plaintiffs' experts or other witnesses, including commenting on the truth or accuracy of the other expert's report, the other expert's qualifications, etc. The experts should testify regarding his/her own work. No witness may comment upon the truth of testimony given by another witness. *Peterson v. Ominex*, Judge Sam Haddon Order, May 24, 2007 (attached hereto as **Exhibit B**). Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding such statements.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court enter an order *in limine* as provided herein.

Respectfully submitted this 2nd day of November, 2018.

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

By: /s/ Jinnifer J. Mariman
ROGER SULLIVAN
ALLAN McGARVEY
JOHN F. LACEY
ETHAN WELDER
DUSTIN LEFTRIDGE
JINNIFER JERESEK MARIMAN

Attorney for MHSL Plaintiffs

Exhibit A



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

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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.

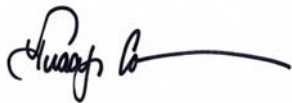
It has been noted that the Foundation reported contributions received from John Heberling. I verified that the Foundation reported the following contributions from Mr. Heberling, which total \$55,000:

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 B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION MAY 24 PM 2 29

LON AND DEBRA PETERSON,

Plaintiffs,

vs.

OMIMEX CANADA, LTD.,

Defendant.

PATRICIA L. ...

BY

DEPUTY CLERK
No. CV-05-59-GF-SEH

ORDER

On May 18, 2007, the Court held a hearing on Plaintiff's Motion for Partial Summary Judgment on Defendant's Mitigation of Damage Defense, Plaintiff's First Motion *In Limine*, Defendant's Motion for Partial Summary Judgment RE: Cell Phone Policy, Defendant's First Motions *In Limine*, and Defendant's Second Motions *In Limine*. All motions were opposed.

The Court also addressed and resolved the joint motion to extend the deadlines.

Upon the record made in open court,

ORDERED:

1. Plaintiffs' Motion for Partial Summary Judgment on Defendant's Mitigation of Damage Defense¹ is DENIED.

2. Plaintiffs' First Motion *In Limine*² is GRANTED in part and DENIED in part as follows:

a. Evidence of insurance payments, collateral sources of payment, and the

¹ Docket No. 45.

² Docket No. 47.

lack of traffic citation are excluded.

b. Highway Patrol Officer Sons may not offer expert testimony and cannot testify as to the point of impact of the accident. The Court reserves ruling on Highway Patrol Officer Sons' potential testimony regarding reasonable speed.

c. Dr. Alex Chung may, if qualified, testify as to his opinion that Michael Lindberg's injuries were consistent with steering wheel impact. Michael Lindberg's medical records will not be allowed into evidence at trial.

d. Dr. Denny Lee will be allowed to provide testimony as to his own work, what he did, and what his own work discloses. Neither he nor any other witness may comment upon the accuracy or lack of accuracy of testimony given by another witness.

e. Sandra Reichoff may testify, if qualified, about alternate earning capacities that Plaintiff might have.

f. Daniel Vuckovich may not testify as to the accuracy or lack of accuracy of testimony given by another witness.

g. John Finstad and Mike Wahler may not testify as to Plaintiff Lon Peterson's prior driving activity.

3. Defendant's Motion for Partial Summary Judgment RE: Cell Phone Policy³ is GRANTED.

4. Defendant's First Motions *In Limine*⁴ is GRANTED in part and DENIED in part as follows:

³ Docket No. 49.

⁴ Docket No. 53.

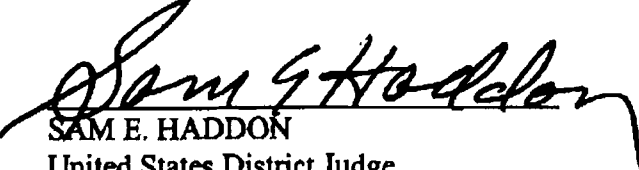
- a. Evidence of insurance, lack of traffic citation, golden rule arguments, and arguments without foundation will not be allowed.
- b. Plaintiffs may not introduce expert testimony identified as rebuttal evidence in Plaintiffs' case-in-chief.
- c. Testimony as to future medical care will be admissible if appropriate.

5. Defendant's Second Motions *In Limine*⁵ is GRANTED in part and DENIED in part as follows:

- a. Issues relating to crop insurance loss payments, the jaws of life, and replacement surgery are withdrawn.
- b. Plaintiff Lon Peterson will be allowed to testify as to amounts of crop losses.
- c. Testimony relating to tractor damage will not be allowed.

6. The Joint Motion to Extend Deadlines⁶ is DENIED.

DATED this 24th day of May, 2007.


SAM E. HADDON
United States District Judge

⁵ Docket No. 59.

⁶ Docket No. 85.

CERTIFICATE OF SERVICE

I, Jinnifer Jeresek Mariman, 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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Electronically Signed By: Jinnifer Jeresek Mariman
Dated: 11-02-2018