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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFFS' MOTION IN LIMINE RE: VARIOUS EVIDENTIARY ISSUES AND BRIEF IN SUPPORT THIS DOCUMENT RELATES TO: *Barnes, et al. v. State of Montana, et al.,* 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, or submitting testimony or evidence regarding, the Various Evidentiary Issues addressed herein.

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.

INTRODUCTION

The undisputed facts in this case have been set forth in Plaintiffs' summary judgment filings.

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APPLICABLE STANDARDS

The purpose of a motion *in limine* is to prevent the introduction of irrelevant, immaterial, or unfairly prejudicial evidence. *See Hulse v. State, Dept. of Justice, Motor Vehicle Div.*, 1998 MT 108, ¶ 15, 289 Mont. 1, 961 P.2d 75. Motions *in limine* are a preferred means to prevent references to inadmissible evidence, and thereby avoid otherwise necessary objections, which

only call attention to prejudicial matters. *See Cooper v. Hanson*, 2010 MT 113, ¶ 38, 356 Mont. 309, 234 P.3d 59.

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 define the limits of improper evidence prior to trial. *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).

PLAINTIFFS' MOTIONS *IN LIMINE*

1. BNSF cannot use the "golden rule" to personalize itself as a contributing member of the Libby community in appealing to jurors' prejudice.

BNSF's history of appealing to jurors' sympathies as a necessary employer, innocent actor, and benevolent contributor in their communities is inappropriate and should be addressed by the Court *in limine*.

BNSF in this case has gone so far in this case as to disclose that it intends to have Dr. David Sicilia testify 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 also states that Dr. Sicilia will be authoring a report at some point in the future that will presumably contain similar improper statements and opinions.[1]

These opinions (and the similar argument that Plaintiffs expect BNSF to inject) are in the first place not relevant to the issues in this case. Even if they were, they reflect BNSF's intent to (a) personalize and emphasize that BNSF allegedly "provided enormous economic benefits and helped establish Libby as a viable community," and thereby (b) improperly prejudice and appeal to the sympathy of the Libby jurors who will sit on this case. Such statements and opinions should be excluded.

In the medical malpractice case of *Cooper v. Hanson*, 2010 MT 113, ¶ 17, 356 Mont. 309, 234 P.3d 59, defense counsel labeled Dr. Hanson "a member of this community" during his closing argument, and then told the jury that Dr. Hanson, "could have stayed in Akron . . . We're lucky to have him. We're lucky to have a trained orthopedic surgeon." Counsel then referenced whether the jury could be "proud" of putting a "black mark" on the doctor via its verdict. *Id.*, ¶ 18. Despite the plaintiff's pre-trial motion *in limine* to prevent improper defense argument in this area, including that the doctor's reputation might be harmed, the district court allowed the defense argument and denied plaintiff's motion for a new trial. *Id.*, ¶¶ 4, 19-20.

The Montana Supreme Court noted first that plaintiff had properly sought a pretrial *in limine* ruling "to guard against appeals to passion or prejudice." *Id.*, ¶ 38. It discussed the purpose of defense counsel's "black mark" comment going all the way back to voir dire, and how in closing it was specifically timed and intended to influence the outcome of the case. *Id.*, ¶

[1] As reflected in other motions before the Court, Plaintiffs have moved *in limine* to exclude any opinions of Defendants' experts that were not properly and timely disclosed, including the forthcoming opinions of Dr. Sicilia alluded to here.

38. In reversing the district court and ordering a new trial, the Montana Supreme Court characterized the closing argument references as the culmination of "the Defendant's unlawful appeal to the passions and prejudices of the jury." *Id.*, ¶ 43.

Here, we are not left to guess about the purpose of BNSF's intent and argument. Dr. Sicilia's report makes clear that BNSF intends to inject BNSF as 'a member of this community' that Libby jurors should consider 'lucky to have.' Counsel's purpose is transparent, and the argument is not allowed by Montana law.

Plus, the Montana Supreme Court has already labeled similar attempts by this same BNSF counsel to personalize the railroad as "clearly improper" appeals to the jury's passion and prejudice. *See Daley v. Burlington N. Santa Fe Ry. Co.*, 2018 MT 197, ¶¶ 30-31, 392 Mont. 311, 425 P.3d 669. In *Daley*, BNSF counsel described BNSF's industrial hygienist as "the ones that are having the finger pointed at them," even though he "want[ed] to look out for folks, folks that you care about" because he "would go around and . . . get to know these people. These people would become his friends." *Id.*, ¶ 30.[2]

In short, there can be no doubt about: (a) BNSF's intent to rely on this kind of argument in its appeal to the jurors' passion and prejudice; (b) its unlawfulness pursuant to applicable Montana Supreme Court opinions; and (c) the appropriateness of this Court precluding such argument throughout all stages of trial with an *in limine* ruling pursuant to Plaintiffs' motion.

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[2] *See* also attached Exhibit 1, a portion of the trial transcript from *Daley v. BNSF*, Montana Eleventh Judicial District Court, Cause No. DV-05-882(C), 2114:15-24 (depicting part of the closing argument by BNSF counsel) ("if there's something that I hope you guys took away from that, I hope you guys recognize that this is a company . . . that's always been looking out for the welfare and health of its employees. If that's the one overriding principle or thought that you get out of what I've presented or what I've tried to present to you, I hope that's it.").

2. <u>BNSF cannot argue or imply that Plaintiffs, Plaintiffs' counsel, or their experts are overly litigious</u>.

Another consistent theme of BNSF's defense at trial is to portray Plaintiffs, together with their attorneys and other witnesses, including experts and medical providers, as orchestrating an unwarranted and self-serving litigation scheme. Plaintiffs have filed separate motions *in limine* (a) to prevent Defendants from presenting any argument or evidence regarding CARD finances and CARD's relationship with attorneys, and (b) to ensure that as appropriate, Plaintiffs be allowed to present a truthful picture of any litigation in which Plaintiffs' witnesses, including experts, may be involved. See MIL No. 3 below. This particular motion has a broader but still necessary purpose.

It is "sharp practice" to suggest to a jury that a plaintiff is greedy for hiring an attorney. *See Jenks v. Bertelson*, 2004 MT 50, 320 Mont. 139, 86 P.3d 24. The Montana Supreme Court in *Jenks*, ¶ 15, stated:

> Accident victims should be able to seek legal counsel whenever they feel the need, without fear that their prompt attention to a legal problem will be thrown back in their faces at trial. It demeans our profession to suggest to a jury that there is something nefarious about an injured person promptly seeking out legal representation after an accident.

The exact same demeaning intent applies when defense counsel imply "nefarious" motives to a Plaintiff having sought medical care from an experienced institution such as CARD in their local and rural community, or against the other witnesses who might testify on Plaintiffs' behalf.

The fact remains that BNSF has an established history and consistent plan to characterize those involved with bringing claims against it as unscrupulous. And here, where clearly there are more Libby Claimants involving these attorneys and witnesses than just those of the Plaintiffs whom this jury will see, it can reasonably be anticipated that BNSF will employ this abusive tactic. *See Anderson v. BNSF Ry.*, 2015 MT 240, ¶ 79, 380 Mont. 319, 354 P.3d 1248

(describing BNSF's "consistent tactic" of attacking claimants, attorney, coworkers, and doctors at trial as "inflammatory and wholly inappropriate . . . undermin[ing] the truth-finding function of the jury trial by encouraging jurors to base their decision on prejudice, rather than evidence.").

This is not to say that BNSF must surrender its ability to advance competent evidence in support of valid defenses. *See, e.g.,* Rule 401, M.R. Evid. Instead, this motion recognizes that there is no provision in the law that allows a defendant to attack the motives and credibility of counsel for a party, much less the credibility of one's case as a whole—or in this instance, before a *Libby jury*, even a whole body of claims.

As the Montana Supreme Court stated in *Anderson*:

> Cases should be decided **on their merits**, not on the basis of the amount of improper prejudice that can be injected into a trial. We have long held that the acid of improper argument may eat away at the evidence, leaving only prejudice against the party towards whom the argument is directed. *Kuhnke v. Fisher,* 210 Mont. 114, 125, 683 P.2d 916, 922 (1984). In such cases, we are compelled to overturn the jury's verdict and remand for a new trial. Having reviewed the trial and the arguments in their entirety, BNSF's repeated violations of the District Court's orders in limine were simply too prejudicial for us to retain confidence that the jury's verdict was based on the evidence and not prejudice. BNSF's defense on the merits of Anderson's claims was based in large part on the argument that cumulative trauma injuries do not exist. While this may be a valid defense and BNSF is certainly permitted to present competent evidence to that effect, the validity of this defense is compromised when it is packaged with improper arguments appealing to prejudice.

Anderson, ¶ 80 (emphasis added).[3] Here, there should be no dispute that this case should be decided on its merits. This motion *in limine* is necessary to preserve that focus, and to prevent BNSF from instead seeking to have this case (and who knows how many other Libby cases behind it) decided through improper attacks on individuals appearing on Plaintiffs' behalf before the jury.

[3] Unless otherwise noted, all emphasis hereinafter is added.

3. BNSF cannot prevent testifying witnesses from offering the *full* truth associated with their testimony.

Plaintiffs seek an *in limine* ruling that permits Plaintiffs' witnesses to testify truthfully and fully if BNSF opens the door on any subjects where it has previously secured its own *in limine* exclusion of evidence. In that regard, BNSF repeatedly seeks to exclude evidence that a testifying witness has been diagnosed with an asbestos related disease. Similarly, BNSF has sought to exclude evidence from a testifying expert or doctor regarding other claims. Plaintiffs anticipate that BNSF will again employ the tactic of first seeking to use its own *in limine* order as a shield, then employ the resulting limitation on testimony as a sword in cross examining the silenced witnesses. Plaintiffs' anticipatory motion *in limine* seeks to ensure that any such motion *in limine* that BNSF relies on is not abused.

BNSF consistently cross examines witnesses for Plaintiffs regarding their motives for testifying, including the fact intended to show bias that they are represented by Plaintiffs' counsel. However, it then seeks to prevent the witness from explaining the nature of his own illness, exposure, or "other claim" that has led to his relationship with Plaintiffs' counsel, thereby presenting a wholly inaccurate and prejudicial picture to the jury. It has done the same with workers whose testimony can only be submitted by deposition because their own (similar) exposures and disease actually caused their death. That is, in arguing to the Court that "other claims" of illness are not relevant to proving Plaintiffs' injury, BNSF shields from the jury the full truth behind the witness's testimony and representation by plaintiffs' counsel.

The prejudicial impact is even greater when BNSF cross-examines an expert or doctor about having worked on "hundreds" of cases with Plaintiffs' attorneys over the years, but then argues to preclude the expert or doctor from explaining the kinds of cases or other testimony that he offered because to do so would be to inject evidence of "other claims." Plaintiffs' motion seeks only to

ensure that a witness is allowed to testify fully and truthfully when BNSF opens the door on topics like the ones described here.

The Montana Supreme Court clearly supports Plaintiffs' motion *in limine*. In *Hall v. Big Sky Lumber & Supply, Inc.*, 261 Mont. 328, 336-37, 863 P.2d 389, 394-95, counsel moved prior to trial to exclude evidence of a driver's citation for defective brakes. During closing argument and after relying on the *in limine* ruling to keep out the brake citation, he then made a statement to the effect that, 'If there were any problems with the brakes, you can be sure the officers would have told you that.' *Id.* The Montana Supreme Court affirmed the initial *in limine* exclusion, but held in *Hall*, 261 Mont. at 337, 863 P.2d at 395, that:

> the subsequent argument by defense counsel to the jury is improper legal maneuvering. Defense counsel cannot ask to have evidence excluded and then argue that if the evidence existed it would have been admitted.

Montana law is also clear that a district court abuses its discretion by not allowing testimony and evidence after the other party has opened the door. *See State v. Guill*, 2010 MT 69, ¶ 39, 355 Mont. 490, 228 P.3d 1152. "When one party opens the door, or broaches a certain topic that would otherwise be off limits, 'the opposing party has the right to offer evidence in rebuttal, including evidence of other acts.'" *Guill*, ¶ 39 (citing *State v. Veis*, 1998 MT 162 ¶ 18, 289 Mont. 450, 962 P.2d 1153). And, "[a] party may open the door to a given subject during its opening statement," in which case the other "party may rebut an allegation of bias by offering testimony to explain the initial suggestion or correct a false impression given by the other party." *Guill*, ¶ 39 (citations omitted).

Accordingly, Plaintiffs seek an *in limine* ruling that permits Plaintiffs' witnesses to testify truthfully and fully if BNSF opens the door on any subjects where it has previously secured its own *in limine* exclusion of evidence.

4. BNSF must disclose any demonstrative exhibits that it intends to rely upon, and any evidence contained therein must *first* be separately foundationed.

Plaintiffs have learned through past experience that BNSF utilizes many demonstrative exhibits through the course of trial, many in the form of PowerPoint slides or charts summarizing medical and documentary records. Many of these exhibits use cherry picked statements out of context or otherwise manipulate exhibits to grossly misrepresent the evidence. Nearly always, BNSF makes no attempt to introduce its demonstrative exhibits into evidence. Rather, the demonstrative is presented without notice or warning to a witness during direct examination or cross examination. In that presentation, BNSF fails to lay the proper and required foundation for those demonstratives or the documents underlying them. Yet the demonstratives are nonetheless shown to the jury during examination. Doing so creates unfair prejudice to Plaintiffs because proper foundation is critical to ensure the demonstrative accurately and truthfully depicts the underlying evidence from which the demonstrative is derived.

Whether a demonstrative exhibit can be shown to the jury depends on whether the District Court has first determined that it meets the criteria which the Montana Supreme Court has laid down, including that it: (1) supplements the witnesses' testimony describing the event; (2) clarifies some issue in the case; (3) is accurate and relevant; (4) shows whether any change in conditions has been adequately explained; and (5) has probative value that outweighs any prejudicial effect. *See State v. Ingraham,* 1998 MT 156, ¶ 94, 290 Mont. 18, 966 P.2d 103, 118, citing *Palmer v. Farmers Ins. Exch.* (1988), 233 Mont. 515, 522-23, 761 P.2d 401, 406; *Workman v. McIntyre Constr. Co.* (1980), 190 Mont. 5, 24, 617 P.2d 1281, 1291.

As explicated in *Workman,* it is reversible error to allow the use of unapproved demonstrative exhibits which are sprung on the opposing party at trial. In reversing the trial court, the *Workman* Court explained:

> The first notice plaintiff had of the State's intention to introduce any film exhibits was when the State, in its opening statement, indicated that movie films would be shown to the jury. Exhibit 13A was not listed as an exhibit in the pretrial order.
>
> Immediately after the opening statement, the plaintiff objected to the introduction of any movies for two reasons:
>
> 1. They were not listed as an exhibit in the pretrial order, and
>
> 2. The movies were not available for pretrial examination to determine their relevancy or comparability to the facts and circumstances involved in this case.

Workman, 190 Mont. at 11, 617 P.2d at 1284.

Accordingly, Plaintiffs request the Court enter an order *in limine* requiring the parties to: 1) timely exchange all summaries and demonstratives that each side proposes to use at the time of trial, and 2) prohibits showing to the jury any demonstrative exhibit that has not first been approved for use by the Court.

5. BNSF cannot argue or imply that its Libby properties were safe by relying upon its own failure to conduct mandatory testing.

BNSF has repeatedly stated and implied that all its properties such as the Libby Railyard were safe and presented no risk of airborne asbestos. However, BNSF did not conduct testing required by OSHA, which, among other responsibilities, required:

> (f) Monitoring - (1) Initial Determinations. Within 6 months of the publication of this section, every employer shall cause every place of employment where asbestos fibers are released to be monitored to determine whether every employee's exposure is below the PEL.

See Hart Report at ¶ 92, attached to Second Sullivan Affidavit as Exhibit 71. The sampling required includes both personal and environmental samples.

Given (a) BNSF's knowledge of asbestos in the ore going back to the 1920s, (b) BNSF funded studies from 1959 and thereafter demonstrating that the ore was inextricably contaminated with asbestos, (c) W.R. Grace's placement of asbestos warning placards on its railcars beginning in the mid 1970's, and (d) Grace's supplying BNSF with MSDS disclosures

beginning in 1974 for vermiculite concentrate, which communicated that the material contained asbestos and that regular handling of the materials could release asbestos fibers, BNSF cannot argue that it lacked knowledge that asbestos fibers were being released at the Libby Railyard. *See Plaintiffs' Amended (50 Page Limit) Response to BNSF Railway Company's Combined Motion for Summary Judgment,* at pp. 15-25 and documents and undisputed facts cited therein; see also Hart Report at ¶ 70. Nevertheless, despite BNSF's knowledge and the applicable OSHA requirement, **BNSF did not perform any air monitoring in Lincoln County** until after the EPA-mandated remediation of BNSF's properties began in 2001. *See* Hart Report at ¶ 42. If any such testing did take place prior to the EPA-mandated remediation, BNSF has not produced the results of such pre-cleanup testing.

BNSF should not be able to argue from its complete lack of evidence that the airborne environment around its properties was safe. That argument is solely supported by BNSF's **failure** to conduct the testing that it was required to perform. BNSF should not be able to benefit from this lack of data when such void is directly due to its own failure to meet statutory sampling duties and its subsequent alteration of the railyard conditions. *See, e.g., Sweet v. Sisters of Providence in Washington*, 895 P.2d 484 (Alaska 1995) (where a medical malpractice plaintiff's ability to prove negligence is impaired by the defendant's breach of duty to create or maintain adequate records, a trial court should shift the burden of proof to defendant to prove by a preponderance of evidence that it was not negligent); *Spotted Horse v. BNSF*, 2015 MT 148, 379 Mont. 314, 350 P.3d 52 (noting that default judgement and other sanctions should be taken against a defendant who engages in discovery abuses or spoliates evidence and citing to several occasions where BNSF has been the subject of such rulings).

In prior trials with BNSF, BNSF has argued to the jury that BNSF did similar testing on its own (out of "extra care") and not due to any mandatory testing requirements. However, it is clear BNSF did not perform pre-cleanup testing mandated by OSHA and other standards of care of the time.

The first testing BNSF did was pursuant to the asbestos remediation project, which was mandated by the EPA. *See* Hart Report at ¶¶ 42-43, attached to Second Sullivan Affidavit as Exhibit 71. BNSF fought that cleanup as evidenced by documents associated with the CERCLA investigation and proceedings. *Id.* BNSF should not be able to state they did the testing on its own, in essence out of the good in its heart, and not due to any mandatory testing requirements.

Similarly, in prior trials, BNSF has represented to the jury that of its own volition BNSF took it upon itself to clean its Downtown Libby Railyard to levels exceeding normal EPA cleanup standards (e.g. 1% asbestos soil content), despite the fact that there was no actual hazard presented by its facility. This position is misleading in many respects. The asbestos remediation that took place on BNSF's Lincoln County facilities was mandated by the EPA. BNSF was required to take on the responsibility for clean-up as a result of a CERCLA investigation and proceedings, and a resulting Settlement Agreement and Administrative Order on Consent. *See* Hart Report at ¶¶ 42-43, attached to Second Sullivan Affidavit as Exhibit 71. The remediation levels observed at the facilities were required by EPA, which did not apply a 1% asbestos soil content standard, and the EPA had to oversee the remediation and intervene on multiple occasions when BNSF clean-up efforts were not meeting required standards. Moreover, the EPA required the remediation of BNSF facilities for the sole reason that they presented an asbestos hazard. As such, any assertion at trial that BNSF took it upon itself to perform the clean-up (out of extra care or otherwise), exceeded applicable clean-up standards, that a 1% asbestos soil

content standard is at all applicable, or that no asbestos hazard existed at its facilities, are untrue and prejudicial to Plaintiffs, and should be precluded.

Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding BNSF from benefitting from its failure to perform federally mandated sampling and preclude such statements, evidence, and opinions.

6. Evidence of the parties financial condition should be excluded.

The financial condition of the parties, including both Plaintiffs and all Defendants, is irrelevant to any pre-verdict proceedings. Evidence of wealth or financial condition of the parties may not be introduced in a civil case unless punitive damages are being claimed. *See Safeco Insurance Co. v. Ellinghouse* (1986), 223 Mont. 239, 255, 725 P.2d 217, 227. Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding such evidence.

7. Evidence of any settlement negotiations or offers should be excluded.

To the extent settlement offers have been exchanged between the parties prior to trial, evidence of those offers or negotiations should be excluded at trial pursuant to Rules 408, 401, 402, and 403, Mont. R. Evid. Defendants should be precluded from introducing any evidence or making any comments or arguments regarding any settlement negotiations, offers, or offers of judgment.

8. Evidence of any attorney advertising should be excluded.

Defendants may seek to inquire into jurors' beliefs about attorney advertising in *voir dire*. This questioning and any related evidence, comment, or argument about attorney advertising is irrelevant and presents a danger of unfair prejudice. Mont. R. Evid. Rules 402, 403. Thus, Plaintiffs respectfully request the Court order *in limine* to prohibit such statements/evidence.

9. Plaintiffs reserve any motions *in limine* necessitated by upcoming depositions.

Plaintiffs will be conducting a Mont. R. Civ. P. Rule 30(b)(6) deposition of BNSF as well as depositions of BNSF's experts whose opinions were just recently disclosed in this case. Those depositions could raise the likelihood of additional objectionable trial testimony and evidence for which Plaintiffs could deem it necessary to seek an order *in limine* from this Court. Thus, Plaintiffs reserve their motions *in limine* regarding the discovery obtained in those upcoming depositions.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motions *in limine* to prevent Defendants from arguing on the basis of, or submitting testimony or evidence regarding, the Various Evidentiary Issues addressed herein.

DATED this 21 day of November 2018.

McGARVEY, HEBERLING, SULLIVAN
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EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 17-0681

KENNETH DALEY,

Plaintiff and Appellant,

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 and Appellees.

VOLUME 4 OF 4

PARTIAL TRANSCRIPT OF PRETRIAL AND JURY TRIAL PROCEEDINGS ON APPEAL FROM THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF MONTANA, FLATHEAD COUNTY
(Excludes Transcript of Jury Selection)

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MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

Cause No. DV-05-882(C)

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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Taken at Flathead County Justice Center
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TUESDAY, JULY 18, 2017 ~ 8:31 A.M.

(The following proceedings were had in the courtroom in the absence of the jury:)

00:24 THE COURT: You may have a seat. And Mr. Towe, any preliminary matters?

00:24 MR. TOWE: No, Your Honor.

00:24 THE COURT: Mr. Knight?

00:24 MR. TOWE: Oh, wait.

00:24 THE COURT: Oh, okay. Go ahead.

00:24 MR. TOWE: Apologize. I don't want to get crosswise with the Court's ruling with Nurse Crowley. Was the Court saying she cannot testify at all, or it has to be rooted within -- connected to the medical testimony?

00:24 THE COURT: It would have to be rooted to what is evidence presented.

00:24 MR. TOWE: And she should not say anything from Dr. Loewen's report. That's --

00:24 THE COURT: Yes. I mean, and I'll -- yes. I mean, I think you're correct in that interpretation. But I'll point out to you, you have three and-a-half hours total remaining --

00:25 MR. TOWE: Right.

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{*} Denotes Phonetic Spelling

00:25 THE COURT: -- for direct and cross-examination.

00:25 MR. TOWE: Yep.

00:25 THE COURT: So you decide how you want to use that. And the Court has -- I mean, as you're aware, that's the Court's duty, is to manage time and resources. I gave you the seven days, an extra day that the parties requested. And once that three and-a-half hours is up, Plaintiff is done.

00:25 MR. TOWE: Okay. Is she permitted to say that she -- in the course of her work and to establish her foundation she communicates with the treating physician?

00:25 THE COURT: Would you be objecting to that, Mr. Knight?

00:25 MR. KNIGHT: Your Honor, if he's just talking about what a proper methodology is in general, I don't see where I have a problem with that.

I'm real concerned about him trying to delve into issues and her end up telling this jury that, Yeah, and I talked to Dr. Loewen, though, in this particular case and we talked about all these things that I'm

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You know, I talked to you guys at the beginning of this case about it being an interesting and, I think, rewarding job to represent a company like this that has such a long and interesting history. And, you know, I hope you guys -- I hope you guys got a little bit of a taste of that. It's kind of hard to share in a short amount of time, particularly when my case was so short.

But, you know, we did look back a little bit, right? We looked back into the '30s, all the way back that far, and kind of looked at different windows coming back from the '30s.

And I hope, you know -- if there's something that I hope you guys took away from that, I hope you guys recognize that this is a company that, going all the way back into that time period, was one that's always been looking out for the welfare and health of its employees. If that's the one overriding principle or thought that you get out of what I've presented or what I've tried to present to you, I hope that's it.

You know, yeah, back in the 1930s

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there were folks doing some tough physical work, right, out at railroad shops, working on locomotives in these back shops, and working on stripping and re-insulating some tough steam engines, the big boilers and those kind of things, and doing it day in and day out.

You know, and even those scientists at the time -- we heard some of those names, like Merewether and Fleischer and Drinker and those -- were saying that those kind of jobs were safe and they weren't gonna make people sick.

What we learned was that, even back then, these railroad companies, led by people like Dr. Roscoe Webb, were taking a leadership role and trying to figure out a way, you know, Well, let's see what we can put in place to try to protect folks anyway. And that's where all these documents that Mr. Towe has been showing you guys come from. They come from that effort. They come from the effort to do the right thing, to look out for your people and take care of them like they're your family. And so we saw that, and we see that coming all the way through, I think, the time

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that Mr. Daley was here.

You know, when we talk about Mr. Daley's time, we get all the way into the '70s, right? So -- and that's when he starts working at the tie plant. And that's really the most important era for us -- or for you guys, I guess, when you're thinking about this case. And I guess we got to figure out a way to put ourselves into that era, right?

You know, I mentioned at the beginning of this case that I was born in 1971, so I don't remember a whole lot about '68 or '69, or even the early '70s for that matter. But I can kind of think back, and I can look and see what was out there and try to put myself in that mindset.

You know, think about yourself, if you were in 1967, riding in that old pickup truck that I showed you guys in my opening statement, or maybe a -- I don't know, maybe a Ford Falcon was more your choice. And you flipped on the radio, you'd probably be hearing a song like *R-E-S-P-E-C-T*, from Aretha Franklin, or the top songs in the country in 1967. Or maybe *Baby, Light My Fire,* from The

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Doors, was more your style, right? But it was a different era. It was a long time ago. But, you know, it also -- it wasn't the '30s, either.

When Mr. Daley came to work at Somers Tie Plant, he wasn't working here. Those kind of jobs didn't exist anymore. Those kind of jobs were long gone. He worked outdoors, in open air, on a tank engine, for the most part riding it around and moving things from this part of the yard to that part of the yard, enjoying a great part of the country while he did it, and working with some really great people along the way.

And one time a year, during one time a year, he says he would go in and do this repair work on the locomotive. That was his job. And we certainly know, and Mr. Daley never had a job like this, he would repair eleven valves once a year, with something that we can be fairly certain didn't even contain asbestos.

And he had people looking out for him just in case there was, people like Mr. Liukonen, who you heard from. So when he

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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