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IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,	**Cause No. AC 17-0694**
	DEFENDANTS BNSF RAILWAY COMPANY'S AND JOHN SWING'S MOTION IN LIMINE REGARDING PUNITIVE DAMAGES
	Applies to Barnes, et al. v. State of Montana, et al.

COME NOW Defendants BNSF Railway Company ("BNSF") and John Swing, by and through their undersigned counsel, and submit this *Motion in Limine Regarding Punitive Damages* and *Brief in Support*.

MOTION

Defendants respectfully request that this Court preclude the admission of or reference to punitive damages, "punishment" of the Defendants, "making an example of" Defendants, or "deterrence." Defendants anticipate that Plaintiffs may assert that Defendants committed actual malice or actual fraud, and therefore, Plaintiffs are entitled to punitive damages. Because Plaintiffs have failed to properly state a claim for punitive damages and they have failed to present sufficient evidence of actual malice, the issue of punitive damages cannot and should not be submitted to the jury.

In the alternative, Defendants respectfully request separate trials before two different juries: with an initial phase regarding issues of liability and a second phase on punitive damages.

BRIEF IN SUPPORT

I. LEGAL STANDARD

"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." *Hunt v. K-Mart Corp.*, 1999 MT 125, ¶ 11. The purpose of such motions is to "prevent the introduction of evidence which is irrelevant, immaterial, or unfairly prejudicial." *State v. Meredith*, 2010 MT 27, ¶ 42 (internal citations omitted). The trial court has the authority to grant motions in *limine* under Rule 104(a), Mont. R. Evid., and under its inherent poer to "admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties." *State v. Ayers*, 2003 MT 114, ¶ 23 (internal citations omitted). Motions in *limine* may be made at any time before the challenged evidence is offered or alluded to before the jury. *Gendron v. Pawtucket Mut. Ins. Co.*, 409 A.2d 656, 659 n. 3 (Me. 1979).

A claim for punitive damages "must be proved by clear and convincing evidence." *Safeco Ins. Co. v. Ellinghouse*, 223 Mont. 239, 255, 725 P.2d 217, 227, 1986 Mont. LEXIS 1034, *31. "Therefore, although evidence going to the issue of financial worth as it relates to punitive damages is discoverable prior to trial in order to be ready to conduct the 'immediate' post-trial hearing before the jury, such financial evidence is not discoverable until such time as the party seeking punitive damages has established before the Court a factual basis which would make out a prima facie case of actual malice or actual fraud, thus triggering the availability of punitive damages. Without such prima facie evidentiary proof, a party's requests for extensive financial information is unnecessarily intrusive and not warranted under MCA Secs. 27-1-220 and 27-1-221, and any motion seeking discovery of such financial information is premature at best." *Verworn v. Dakolios*,

1995 Mont. Dist. LEXIS 862, *13-14, citing *Safeco Ins. Co. v. Ellinghouse*, 223 Mont. 239, 255, 725 P.2d 217, 227 (1986). "Thus, if and when a pleading party presents evidence to a Court supporting all the necessary elements to an actual fraud or actual malice claim against the opposing party, then and only then, should a Court allow discoverability of the opposing party's financial affairs." *Id*.

To prove actual fraud, Plaintiffs must prove nine elements by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of the falsity or ignorance of its truth; (5) the speaker's intent that the representation be relied upon; (6) the hearer's ignorance of the falsity; (7) the hearer's reliance on the representation; (8) the hearer's right to rely on the representation; and (9) the hearer's consequent and proximate injury caused by the reliance. *Barrett v. Holland and Hart*, 256 Mont. 101, 106, 845 P.2d 714, 717 (1992).

To prove actual malice, Plaintiffs must show by clear and convincing evidence that Defendants "*had knowledge of facts or intentionally disregarded facts to create a high probability of injury to Plaintiff and either deliberately acted in disregard of the probability of Plaintiff's injury or acted indifferently to the probability of Plaintiff's injury*. § 27-1-221 (2), MCA (emphasis added).

II. ARGUMENT

A. Plaintiffs have not properly plead punitive damages from these Defendants, and they have not produced any evidence of actual fraud or actual malice

First, Plaintiffs have failed to specifically allege any facts that would allow the issue of punitive damages to reach the jury. Plaintiffs' Third Amended Complaint ("Complaint") makes no mention of actual malice or of punitive damages with respect to Defendants BNSF and John Swing. *See generally* Complaint. This is especially noteworthy because Plaintiffs specifically allege that another Defendant, Maryland Casualty Company, engaged in actual malice. *See* Complaint, ¶ 153. Even more telling, the language of that allegation mirrors that of the punitive

damages statute:

> Maryland Casualty's acts and omissions were willful, reckless, *and* **constituted actual malice**. Although Maryland Casualty knew that its acts and omissions created a high probability of harm to the Plaintiff and to others that would be exposed to asbestos from Grace's Libby work site, Maryland Casualty nevertheless **deliberately acted in conscious disregard for and indifference to this probability of harm** such that it is appropriate to impose an assessment of punitive or exemplary damages in a sufficient amount to punish Maryland Casualty, deter similar conduct, and to serve as an example and warning to other legal entities similarly situated that conduct of the kind engaged in by Maryland Casualty is unacceptable in our society.

Id. (emphasis added); *compare* 27-1-221(2), MCA ("A defendant is guilty of actual malice if the defendant . . . deliberately proceeds to *act in conscious or intentional disregard of the high probability of injury* to the plaintiff" or "deliberately proceeds to *act with indifference to the high probability of injury* to the plaintiff.") (emphasis added). Again, by contrast, Plaintiffs make no such allegation with respect to either BNSF or John Swing. *See generally* Complaint. On October 11, 2018, Plaintiffs' counsel served a Draft Notice of 30(b)(6) Deposition to BNSF. *See* **Exhibit A**. Topic 15 in the Notice requests that BNSF produce a witness to discuss "The current financial condition of BNSF within the meaning of § 27-1-221, MCA." *Id*. at p. 4. This was the first time BNSF received notice of Plaintiffs' intent to seek punitive damages from it.

Second, even if the Court determines that Plaintiffs have properly requested punitive damages against BNSF and John Swing, Plaintiffs still have provided no evidence to satisfy the statutory definition of actual malice. *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 39. Instead, Plaintiffs lodge numerous accusations against Defendants but cite to no evidentiary proof that would support the elements necessary for punitive damages. Where, as here, the plaintiff fails to present *any* evidence supporting a finding of actual malice, the issue of punitive damages may not be submitted to the jury. *Id.* Plaintiffs have failed to produce any evidence to sustain a claim of

fraud against Defendants BNSF and John Swing. And Plaintiffs have failed to plead that any affirmative representation made by Defendants made the basis of their claim; instead, their claims are based upon Defendants' alleged failures to make a representation. For example, Plaintiffs specifically claim, "BNSF and Swing were negligent . . . in *failing to warn* Plaintiffs of the true nature of the hazardous effects of the [asbestos containing] dust." *See* Complaint, ¶ 121(f). Plaintiffs are not alleging that Defendants made any false representations. They argue instead that Defendants' negligence rests in their failure to make a representation about the vermiculite concentrate they were shipping. None of the nine elements needed in order to sustain a claim for fraud can be met here.

Similarly, Plaintiffs have failed to plead, and the evidence fails to support a claim that, either BNSF or John Swing acted with actual malice. There is no evidence that either Defendant's conduct created a high risk in injury specifically to Traci Barnes, Rhonda Braaten, or Gerri Flores. By extension, there is no evidence to support a claim that BNSF or John Swing acted in disregard of or with indifference to the probability of Traci Barnes, Rhonda Braaten, or Gerri Flores's alleged injury. Therefore, the Court should preclude any discussion of or reference to punitive damages.

B. Punitive damages are not permitted, as a matter of law, where the defendant complies with, or in good faith believes that it complies with, industry practice or regulatory standards

Some courts have held that where a defendant has reasonable grounds to believe its conduct was not unlawful, it cannot be subject to punitive damages, even if it turns out that the defendant's belief was wrong; "courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions." *Lusardi Constr. Co. v. Aubry*, 1. Cal.4th 976, 996-97 (1992) (internal quotations omitted). Similarly, other courts have held that punitive damages are not available when the defendant's actions comply with industry standards. *See, e.g.*, *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with

industry standards and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind."). Evidence that a railroad is "acting according to industry standards . . . overwhelm[s] any suggestion that [it] acted with conscious disregard for safety." *In re Miamisburg Train Derailment*, 725 N.E.2d 738, 751 (Ohio Ct. App. 1999).

These considerations of good faith warranting dismissal of a punitive damages claim are magnified when the defendant's belief stems from participation in a regulatory process overseen by state officials; because punitive damages are intended to punish and deter, abundant authority holds that they should not be awarded when the defendant complied with the regulatory process. *See Chrysler Corp. v. Wolmer*, 499 So.2d 823, 826 (Fla. 1986) ("[A]n award of punitive damages in [such] case not only is unjust, but also ignores the threshold requirements for such an award.").

And even assuming that an issue of fact exists regarding the defendant's regulatory compliance, this would <u>not</u> necessarily create a fact issue regarding punitive damages, "especially where, as here, defendant believed it was complying with these regulations." *See Welch v. General Motors Corp.*, 949 F. Supp. 843, 845-46 (N.D. Ga. 1996).

C. In the alternative, the Court should bifurcate the issues of liability and punitive damages such that they are tried separately

Mont. R. Civ. P. 42(b) states that the Court, in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. The rule for bifurcating issues and presenting the issues to separate juries is made on a case by case basis. First, the Court must analyze whether the issues are intertwined or distinct, and if distinct, "the interests of judicial economy, fairness to the parties, clarity of the issues, and convenience must also be weighed." *Malta Pub. Sch. Dist. A & 14 v. Montana Seventeenth Judicial Dist. Court*, 283 Mont. 46, 51, 938 P.2d 1335 (quoting *Martin v. Bell*

Helicopter Co., 85 F.R.D. 654 (D. Colo. 1980)).

Here, bifurcation would be necessary to ensure a fair trial to both parties and clarity of the issues the two juries would need to decide for the distinct claims. It would also reduce the amount of time necessary to try the two claims. However, a fair trial to both litigants outweighs all of those factors; "A paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience of witnesses must yield thereto." *McKinley v. Menahan*, 385 Mont. 539, 382 P.3d 866 (2016) (Quoting *Malta*, 283 Mont. 46).

Because the issue of liability must be resolved before any punitive damages can be imposed, the separation of punitive damages is the most reasonable approach. This will prevent evidence regarding punitive damages from tainting the jury's determination of liability and compensatory damages. Montana law embraces the conclusion that bifurcation is an appropriate remedy for preventing prejudice in cases where the plaintiff seeks punitive damages. *See Malcolm v. Evenflow Co*., 2009 MT 285, ¶ 107 ("Montana law provides for a bifurcated process for jurors to assess the amount of punitive damages. *In the future, trial courts should consider bifurcating liability issues from punitive damages issues*.") (McGrath, C.J., *concurring*) (emphasis added); *see also Bowen v. W.R. Grace & Co.*, 781 F. Supp. 682, 683 (D. Mont. 1991) ("[E]vidence relating solely to the punitive damages issue *may not be introduced or mentioned during the liability portion of the trial*.") (emphasis added); *Hall v. Babcock & Wilcox Co.*, 69 F. Supp. 2d 716, 733 (W.D. Pa. 1999) (bifurcating liability and punitive damages because "there is no reason to believe that [a] jury [would] not place all the evidence of . . . wrongful conduct on the scale when determining whether [the plaintiffs] met their burden of proof on the issues of liability and compensatory damages"); *Computer Systems, Inc. v. Quantel Corp.*, 740 F.2d 59, 68 (1st Cir. 1994) (quoting J. Ghiardi & J. Kircher, *Punitive Damages: Law & Practice* § 12.01 (1983) ("*It*

cannot be doubted that punitive damages evidence 'has a real potential for influencing the jury's determination [on] … the amount of compensatory damages.'")) (emphasis added).

The only effective way to prevent the prejudicial crossover of these fundamentally different categories of evidence – indeed, the only way to guarantee Defendants receive the fair and impartial trial to which they are entitled – is to bifurcate the liability and punitive damages claims.

If the Court determines that Plaintiffs may properly seek punitive damages against Defendants in this case, Defendants respectfully request that the Court bifurcate the issues of liability and punitive damages, thereby precluding any and all evidence of or reference to punitive damages at any phase during the liability phase of the trial, including but not limited to counsel's arguments, the jury instructions, or the verdict forms.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court preclude all evidence supporting and reference to punitive damages, or "punishing," "deterring," or "making an example of" Defendants. In the alternative, Defendants request that this Court bifurcate the issues of liability and punitive damages into separate trials with separate juries.

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I hereby certify that the original of the foregoing was sent via ECF to the Clerk of Supreme Court of Montana, In Re Asbestos Litigation and a copy was served upon the following counsel of record via the court's ECF System and by U.S. Mail on this 2nd day of November, 2018:

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