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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

)	
)	Cause No. AC 17-0694
IN RE ASBESTOS LITIGATION,)	
)	DEFENDANTS BNSF RAILWAY
)	COMPANY’S AND JOHN SWING’S
)	MOTION FOR LEAVE TO TAKE
)	ADDITIONAL DEPOSITIONS AND
)	BRIEF IN SUPPORT
)	
)	<i>Applies to Barnes, et al. v. State of</i>
)	<i>Montana, et al. DV-16-111</i>
)	

COME NOW Defendants BNSF Railway Company (“BNSF”) and John Swing, by and through the undersigned counsel, and file this *Motion for Leave to take Additional Depositions and Brief in Support*.

MOTION

Because of the sheer number of witnesses disclosed by Plaintiffs, and the nature of those witnesses’ relationship with Plaintiffs’ counsel and/or their status as Libby claimants, Defendants respectfully request that this Court grant leave to take additional depositions, bringing the total number of depositions to 44. BNSF has conferred on multiple occasions regarding this matter. Counsel for Plaintiffs has repeatedly opposed BNSF’s request to depose witnesses in excess of the deposition limit while at the same time maintaining that BNSF may not speak with twenty (20) of

the witnesses due to either (1) their own attorney-client relationship with those witnesses, or (2) the fact that the witness is represented by other counsel.

BRIEF IN SUPPORT

BACKGROUND

On August 16, 2018, Defendants sent a letter to Plaintiffs' counsel requesting the depositions of various fact witnesses and medical providers for each of the three Plaintiffs' claims. **Exhibit A** Letter dated Aug. 16, 2018. The parties had an informal telephone conference with the Court on August 20, 2018. **Exhibit B**, *Amended Scheduling Order*. During that August 20th conference, the Court set the limit for the number of depositions at 20 per side without stipulation or leave of court. *Id.*

Plaintiffs' counsel responded to Defendants' original August 16th letter on August 22, 2018, two days after the telephone conference with the Court. Counsel responded:

Montana Rule of Civil Procedure Rule 30(a)(2) limits the number of depositions defendants may take in a case to 10, absent stipulation or leave of court. **We are willing to stipulate to BNSF taking 25 total depositions in this case.** We note that BNSF has already taken 3 depositions and may want to depose Plaintiffs' experts as well. If that stipulation is agreeable to BNSF, please let us know which fact witnesses and medical providers BNSF would like to depose and we will determine dates they are available for their deposition in advance of the October 5, 2018 discovery deadline.

Exhibit C, Email dated Aug. 22, 2018 (emphasis added). Thus, Plaintiffs have agreed to *at least* 25 depositions.

Four days later, on August 24, 2018, the individual Plaintiffs provided supplementary responses to Defendants' interrogatories in which each Plaintiff listed his or her proposed witnesses. **Exhibit D**, *Barnes's Supp. Resp. to BNSF Disc. Requests*, pp. 1-6; **Exhibit E**, *Braaten's Supp. Resp. to BNSF Disc. Requests*, pp. 1-10; **Exhibit F**, *Flores's Supp. Resp. to BNSF Disc.*

Requests, pp. 1-7. In those responses, Plaintiffs collectively disclosed a *minimum* total of 59¹ witnesses for the first time. *Id.* Plaintiffs also noted in each of their disclosures with respect to the former BNSF employees and former W.R. Grace employees:

As Defendants are aware, many of the above-listed persons are represented by counsel and involved in litigation against Defendants. Direct contact by Defendants with any of these persons is therefore prohibited without first seeking permission from counsel and/or presence of counsel during any desired contact with these persons.

Exhibit D, pp. 4-5; **Exhibit E**, pp. 9-10; **Exhibit F**, pp. 5-6. Plaintiffs' counsel has stated that of these 10 W.R. Grace employees (including Anson Barnes), counsel has an attorney-client relationship with all but one, Rodney Elletson, who is represented by Kovacich Snipes. **Exhibit G**, Email chain dated Nov. 2, 2018. Because these witnesses are represented by counsel, Defendants cannot contact them to interview them and therefore must depose them in the presence of counsel. *See* Mont. R. Prof. Conduct 4.2(a). The same is true for the 10 former BNSF employees represented by counsel. *Id.*

Another four days later, on August 28, 2018, the Court entered an order effectuating its ruling regarding the permitted number of depositions:

In regard to the permissible number of depositions, in consideration of Rule 30, Mont. R. Civ. P., the multiple plaintiffs and defendants, and the complex nature of these proceedings, the Court will permit the Plaintiffs to take 20 depositions and the Defendants (collectively) to take 20 depositions.

¹ Barnes disclosed 5 family members, 3 treating physicians (not including "other treating medical providers, as identified in Plaintiff's medical records"), 5 BNSF management/Industrial Hygiene witnesses (including one assumed 30(b)(6) designee), 11 former BNSF employees (including Barnes's deceased father, by deposition), 5 former W.R. Grace employees, and 4 "other" corporate witnesses. In addition to the witnesses disclosed by Barnes, Braaten disclosed 2 family members and 2 treating physicians (not including "other treating medical providers, as identified in Plaintiff's medical records"). In addition to the already-disclosed witnesses, Flores disclosed 5 family members and 2 treating physicians (again, not including "other treating medical providers, as identified in Plaintiff's medical records"). *See* **Exhibit D**, pp. 1-6; **Exhibit E**, pp. 1-10; **Exhibit F**, pp. 1-7.

Exhibit B, *Amended Scheduling Order Dated Aug. 28, 2018*, ¶ 3.²

Later, on October 26, 2018, Defendants received Plaintiffs' Expert Disclosures, in which Plaintiffs disclosed an additional 11 witnesses. **Exhibit H**, *Plaintiffs' Expert Disclosures*. In their disclosures, Plaintiffs note that in addition to those 11 experts, they may also call "treating providers," "specialists regarding Libby Amphibole in OU6," and "any expert to be disclosed at a later date pursuant to the Court's Scheduling Order." *Id.*, ¶¶ 12-13, 16. Taken with Plaintiffs' individual lists of disclosed witnesses, the total number of potential Plaintiff witnesses has reached a *minimum* of 70.

To date, Defendants have deposed 8 Plaintiff witnesses:

- Plaintiff Tracie Barnes
- Plaintiff Kenneth Braaten
- Plaintiff Gerrie Flores
- Gail Burger, a former employee of the CARD Foundation
- Dr. Michael Goodman, treating physician of Plaintiffs Braaten and Flores
- Dr. Annie Bukacek, treating physician of Plaintiff Flores
- Tina Collins, Plaintiff-Decedent Rhonda Braaten's sister
- Anson Barnes, former W.R. Grace employee

In addition to the foregoing, the parties have scheduled dates for the depositions of 9 former W.R. Grace employees:

- Rodney Elletson
- Butch Hurlbert

² Again, Plaintiffs' email two days after the Court's original ruling during the telephone conference constitutes a stipulation raising the deposition limit from 20 to 25.

- Ed Warner
- Randy Dorrington
- Stuart Cannon
- Lorne Hutton
- LeRoy Thom
- Harvey Vinson
- Albert Urdahl

After these 9 depositions, the total number of depositions taken by Defendants reaches 17. In addition to the witnesses listed above, Defendants still wish to depose the following:

- Dr. Zachary Weber, treating physician of Plaintiff Flores
- Plaintiffs' 12 designated experts, including at least one for each of the two catch-all categories listed in Plaintiffs' expert designations
- The 10 former BNSF employees listed in each Plaintiffs' disclosures (excluding Tracie Barnes's deceased father, Robert Barnes), *see, e.g., Exhibit D, Barnes's Supp. Resp. to BNSF Disc. Requests*, p. 4
- Former W.R. Grace employee Anson Barnes, whom Defendants attempted to depose, but whose deposition was cut short because of hearing difficulties
- Joni Marie Barnes, Plaintiff Tracie Barnes's spouse

With these witnesses included, Defendants' total number of necessary depositions rises to 44.

For the following reasons, Defendants respectfully request that this Court grant Defendants leave to take the additional depositions of the witnesses above.

LEGAL AUTHORITIES

The Montana Rules of Civil Procedure permit a party to take a maximum of ten (10) depositions without having to obtain leave of court. Mont. R. Civ. P. 30(a)(2)(A)(i). Otherwise:

A party must obtain leave of court . . . if the parties have not stipulated to the deposition, and . . . the deposition would result in more than 10 depositions being taken under this rule . . . by the plaintiff, or by the defendants, or by the third-party defendants.

Id. “Depositions serve a purpose distinct from interrogatories, which anticipate deliberate responses.” *Albert v. Hastetter*, 2002 MT 123, ¶ 47 (citing *Hart-Albin Co. v. McLees, Inc.*, 264 Mont. 1, 8 (1994) (noting that depositions encourage “frank and unrehearsed answers to questions.”)).

“The rules of civil procedure are premised upon a policy of liberal and broad discovery.” *State ex rel. Burlington N. R.R. v. District Court*, 239 Mont. 207, 216 (1989). This policy furthers a general desire by the courts to “foster[] sufficient disclosure to enable the ultimate determination of the issues to be based on a full development and presentation of the relevant facts.” *Id.* (quotations omitted) (emphasis added); *see also Saint Vincent Hosp. & Health Ctr. v. Blue Cross & Blue Shield*, 261 Mont. 56, 62 (1993) (“The rules concerning discovery are broad and liberal.”); *cf. Sharbono v. Cole*, 2015 MT 257, ¶ 12 (“The spirit of the civil rules requires a liberal disclosure of witnesses.”) (quotations omitted).

Finally, with respect to depositions in particular, the Montana supreme court has clearly stated, “[***T***]***he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.***” *State ex rel. State Highway Comm’n v. District Court*, 147 Mont. 348, 357 (1966) (emphasis added).

ARGUMENT

I. Rule 30 contemplates a maximum of 10 depositions per side per *plaintiff*, not per side per lawsuit.

Rule 30, by its own express terms, contemplates actions involving *one* plaintiff and *multiple* defendants. Again, the rule provides, in relevant part:

A party must obtain leave of court . . . if the parties have not stipulated to the deposition, and . . . the deposition would result in more than 10 depositions being taken under this rule . . . by the **plaintiff**, or by the **defendants**, or by the third-party **defendants**.

Mont. R. Civ. P. 30(a)(2)(A)(i) (emphasis added).

Because the rule is statutory, any inquiry into its meaning must begin with “the plain meaning of the words used.” *State v. Heath*, 2004 MT 126, ¶ 25 (quoting *Western Energy Co. v. Dept. of Revenue*, 1999 MT 289, ¶ 11); *see also* § 1-2-106, MCA. In examining the plain meaning of a statute’s text, the court must “not . . . insert what has been omitted or . . . omit what has been inserted” and must construe the language of statutory provisions “as will give effect to all.” § 1-2-101, MCA. Here, the text of Rule 30 explicitly includes the plural form of “defendants” and the singular form of “plaintiffs.” *See* Mont. R. Civ. P. 30(a)(2)(A)(i). Those terms are not “technical words and phrases” and have not “acquired a peculiar . . . meaning in law.” § 1-2-106, MCA. Further, the legislature’s inclusion of the plural form of “defendants” but the singular form of “plaintiff” suggests that the singular form was intentional. Thus, Rule 30 contemplates placing a limitation of 10 depositions per side in an action involving *one singular* plaintiff.

II. Rule 30 authorizes a maximum of at least 30 depositions in this case absent stipulation or leave of court, because there are three separate plaintiffs.

This case is different. It involves *three separate* Plaintiffs with separate causes of action against multiple Defendants. Moreover, the three Plaintiffs’ actions were not originally joined;

the three cases were consolidated after they were initiated,³ and the Plaintiffs amended a joint complaint to reflect that new posture. **Exhibit I**, Trans. 03/20/18, 55:23-56:3, 58:15-25 (ordering consolidation); *see also Second Amended Complaint*. Thus, in this case, Rule 30 authorizes at least **30** depositions per side without stipulation or leave of court – 10 per single plaintiff. *See* Mont. R. Civ. P. 30(a)(2)(A)(i); *supra* Part I; *see also State ex rel. State Highway Comm’n*, 147 Mont. at 357 (“[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”) (emphasis added); *State ex rel. Burlington N. R.R.*, 239 Mont. at 216 (“The rules of civil procedure are premised upon a policy of liberal and broad discovery.”).

III. The nature of the relationships between many of the witnesses and Plaintiffs’ counsel requires a greater number of depositions in the interest of justice.

As explained above, Plaintiffs have collectively disclosed 70 witnesses in this case. On that basis alone, limiting the Defendants to a maximum of 20 or even 25 depositions (as stipulated by Plaintiffs’ counsel) is unworkable. Moreover, Plaintiffs’ discovery responses fail to summarize what specific knowledge these witnesses have and what, specifically, they will testify to. *See generally Exhibits D, E, and F, Plaintiffs’ Supp. Resp. to BNSF’s Disc. Requests.*

However, even more compelling and most importantly, of the many disclosed witnesses, many – including but not limited to 9 of the 10 former W.R. Grace employees – are either current or former clients of Plaintiffs’ counsel. Plaintiffs’ counsel has requested that Defendants not contact represented witnesses without first consulting Plaintiffs’ counsel and having Plaintiffs’ counsel present. *See, e.g., Exhibit G*, Email chain dated Nov. 2, 2018. In other words, Defendants cannot simply interview such witnesses without counsel present. *See* Mont. R. Prof. Conduct

³ Defendants filed a Motion for Separate Trials in this matter on November 2, 2018.

4.2(a) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”). And to the extent some of the witnesses are *former* clients of Plaintiffs’ counsel – or, in the case of Rodney Elletson,⁴ are current Libby claimants represented by other counsel – it is even more necessary that Defendants be permitted to examine them under oath; such witnesses are highly likely to be biased in favor of these individual Plaintiffs, and they are likely to be predisposed toward Plaintiffs’ arguments and allegations. Examining these witnesses under oath is the only effective way in which to confirm the extent of their testimony in a reliable manner sufficient to adequately defend these claims. *State ex rel. State Highway Comm’n*, 147 Mont. at 357.

CONCLUSION

In short, Defendants are faced with a staggering number of adverse witnesses, nearly all aligned through common representation. Even after whittling those witnesses down to those whose deposition is absolutely necessary to prepare Defendants’ case, the Court’s limit of 20 depositions and counsel’s stipulation of 25 depositions are insufficient. This is ever truer in light of the fact that at least 10 of these witnesses are or were Libby claimants similarly situated to the Plaintiffs in this case. Defendants cannot informally interview those witnesses who are currently represented by counsel, and as to the witnesses who are *former* Libby claimants, the risk of prejudice and/or bias is so great that Defendants can only properly test their knowledge under oath in a formal deposition setting.

To preclude Defendants from deposing such witnesses will drastically infringe upon their

⁴ Because Mr. Elletson is currently represented by counsel, Defendants are still precluded from interviewing him without counsel present. Mont. R. Prof. Conduct 4.2(a).

rights to fully investigate this case and prepare an adequate defense. Defendants therefore respectfully request that this Court raise the maximum number of depositions to 44, such that Defendants may properly depose the necessary witnesses in this case.

Such is within the Court's discretion, and it accords with the liberal policy underlying the rules governing depositions. *State ex rel. State Highway Comm'n*, 147 Mont. at 357 (“[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”) (emphasis added); *State ex rel. Burlington N. R.R.*, 239 Mont. at 216 (“The rules of civil procedure are premised upon a policy of liberal and broad discovery.”).

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Respectfully submitted,

s/ Chad M. Knight

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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 13th day of November, 2018:

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