

Chad Knight knight@KnightNicastro.com
 Anthony Nicastro nicastro@KnightNicastro.com
 Nadia Patrick npatrick@KnightNicastro.com
 KNIGHT NICASTRO, LLC
 519 Southwest Blvd.
 Kansas City, MO 64108
 Telephone: (303) 815-5869
Attorneys for BNSF Railway Company and John Swing

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,

Cause No. AC 17-0694

**DEFENDANTS BNSF RAILWAY
 COMPANY AND JOHN SWING'S
 RESPONSE BRIEF IN
 OPPOSITION TO PLAINTIFF'S
 MOTION IN LIMINE RE: CARD'S
 FINANCES AND RELATIONSHIP
 WITH ATTORNEYS**

*Applies to Barnes, et al. v. State of
 Montana, et al. Lincoln County Cause
 No: DV-16-111; Judge Matt Cuffe*

COMES NOW Defendants, BNSF RAILWAY COMPANY and JOHN SWING
 ("Defendants"), by and through its attorneys of Knight Nicastro, LLC, and hereby submits
 its *Response Brief in Opposition to Plaintiff's Motion in Limine re: CARD's Finances and
 Relationship with Attorneys.*

INTRODUCTION

In 2002, the CARD Clinic ("CARD Clinic") was established in Libby, Montana in
 response to raised awareness of widespread asbestos exposure arising out of vermiculite
 mining activities in Libby, Montana. CARD Clinic has provided screening, diagnosis, and

counseling to persons potentially exposed to Libby asbestos. Dr. Brad Black (“Dr. Black”) is the Medical Director and CEO of CARD Clinic. CARD Clinic also has a fundraising arm: CARD Foundation, of which Dr. Black is a board member. Dr. Black and workers at CARD Clinic partnered with researchers at the Icahn School of Medicine at Mt. Sinai (“Mt. Sinai”) to research the purportedly unique characteristics and author medical research publications regarding those characteristics and the unique disease arising from exposure to Libby asbestos.

Through discovery, it was identified that at least some attorneys from Plaintiffs’ counsel firms McGarvery, Heberling, Sullivan, & Lacey (“MHSL”) and Kovacich Snipes (“KS”) – Plaintiffs’ counsel for virtually all plaintiffs appearing in the Asbestos Claims Court – contributed financially to CARD Clinic and through the CARD Foundation and that the CARD clinic in return referred its patients to the attorneys. In a transparent attempt to avoid this evidence, Plaintiffs have stated they do not intend to call Dr. Black, CARD Clinic, and Mt. Sinai as witnesses in the Barnes, Braaten, Flores consolidated matter. Plaintiffs then filed a *Motion in Limine* to exclude all argument regarding financial relationships between Plaintiffs’ counsel and CARD Clinic or CARD Foundation.

Regardless of this calculated move, evidence of Plaintiffs’ counsel financial involvement with CARD Clinic, CARD Foundation, Dr. Black, and Mt. Sinai remains relevant evidence because it raises legitimate questions of credibility of the diagnoses and data that Plaintiffs’ experts rely on to generate their opinions, it is highly probative and is not substantially overcome by its prejudicial effect. Despite Plaintiffs’ assertions otherwise, the diagnoses and evaluations of Plaintiffs made by CARD are centrally at issue.

Therefore, Plaintiff's motion should be denied.

ARGUMENT

1. The Evidence Plaintiffs Seek To Exclude is Highly Relevant And Therefore Admissible Under Montana Rules Of Evidence Rules 401 And 402.

According to the Montana Rules of Evidence Rule 402 ("Rule 402") "**All relevant evidence is admissible**, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state." Montana Rules of Evidence 401 ("Rule 401") defines what evidence is relevant:

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

Mont. R. Evid. 401. Plaintiffs seek to preclude Defendants from raising matters that shed light on the credibility of the diagnoses, functional evaluations (pulmonary function tests), data, records, and medical literature on which Plaintiffs' experts rely to generate their expert opinions. Evidence that belies the source of an expert's opinion raises issues of credibility of the ultimate opinion reached, and therefore is "relevant evidence" admissible pursuant to Rules 401 and 402.

This Court itself has already stated on multiple occasions that issues of credibility raised by the financial contributions by Plaintiffs' counsel are both **relevant** and **admissible** as it bears directly on the credibility of CARD Clinic and Foundation witnesses. (See In Re: Asbestos Litigation Order, ¶ 8, Jul. 26, 2018 ("Of course, evidence of financial contributions made by Plaintiffs' counsel as to the primary medical witnesses testifying on

behalf of the Plaintiffs **is relevant and admissible, at a minimum, it goes to the credibility of these witnesses.**") (attached Exhibit 01); Order re: Defendant's Motion for Additional Time to Conduct Discovery on Disqualification and Motion for Leave to Take Depositions of Plaintiffs' Counsel, ¶ 4, Sept. 18, 2018 ("this area of inquiry **directly bears on the credibility of CARD Clinic and CARD Foundation witnesses.**") (attached Exhibit 02)). Despite this, Plaintiffs' counsel paradoxically suggests through their *Motion in Limine* that while such matters are relevant and admissible as to the credibility of CARD witnesses, as no such witnesses are being called, the diagnoses, records, and medical literature generated by these sources are reliable and raising issues of credibility of the data originated therefrom is improper. Such argument is untenable. If the credibility of a witnesses is at issue, so too are the medical records, diagnoses, and scientific literature that person creates.

Matters related to credibility and weight of evidence are the province of the jury. *Kangrga v. Gjorev*, 389 Mont. 545, 402 P.3d 618 (2017) (quoting *Hansen v. Curtis Hansen & Haugen's*, 254 Mont. 152, 157 (1994)). When an expert makes his or her opinion on questionably credible underlying data, that data and the issues of its credibility may be raised at trial so the jury can give the expert's testimony the proper weight and credibility. See Mont. R. Evid. 705; *Wyo-Ben, Inc. v. Bixby*, 2017 Mt. 334, P51, 377 Mont. 318 (2017). Montana recognizes that relevant scientific evidence is properly attacked on cross-examination: "[i]t is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation." *Boucher v. BNSF Ry. Co.*, 2017 Mont. Dist. LEXIS 33, *3-5 (quoting *Harris v. Hanson*,

2009 MT 13, ¶ 32, 349 Mont. 29, 201 P.3d 151).

In *Boucher*, the expert at issue was an orthopedic surgeon that treated plaintiff. BNSF sought to have the expert excluded for not having the appropriate foundation to form his expert opinion, but the Court rejected that position concluding that where the challenge at issue is not that the field of expertise is unreliable, or that the proposed expert is unqualified in that field, the reliability of his conclusions is a matter for the jury, not the Court. See *id.*, at *9. Applying that same rationale here, the credibility and foundation of the expert opinions that Plaintiffs offer is properly challenged by Defendants via cross examination. This allows the jury to exercise its role as fact-finder and determine whether the expert opinions are reliably based on fact. Therefore, it is contrary to Montana precedent to exclude issues of credibility of underlying diagnoses, medical records, and medical and scientific literature underlying those expert opinions, and Plaintiffs' *Motion in Limine* should be denied.

a. The diagnoses originating at CARD and Dr. Black's medical opinions are the cornerstone of Plaintiffs' cases even if CARD and Dr. Black are not presented as expert witnesses by Plaintiffs.

Plaintiffs' disclosed experts rely on the very CARD Clinic diagnoses, records, and medical literature that is undermined due to questions of impropriety as it related to fund raising and financial entanglement of Plaintiffs' counsel, CARD Clinic, CARD Foundation, and Mt. Sinai. Plaintiffs' expert reports from Dr. Carrie Redlich, Dr. Julie Hart, Jennifer Crowley, Dee Walcheck, Reed Gunlikson, Dr. Arthur Frank, Julian

Marshall, Dr. Mark Colella, Dr. Claire Michael, and Plaintiffs' treating providers¹ all base their expert opinions – at least in part – on medical records and diagnoses originated at CARD, and so-called “scholarly” articles regarding the uniqueness and particularly toxicity of Libby amphibole asbestos created by CARD Clinic, CARD Foundation, and/or Mt. Sinai witnesses.

Dr. Redlich expert report of Tracie Barnes

Dr. Carrie Redlich's reports chronicle that she based her expert opinions on medical records from – among other medical providers – CARD Clinic, as well as the expert reports of Dr. Hart, Dr. Marshall, Dr. Colella, Ms. Crowley, and Ms. Walcheck. *See e.g.*, Expert Report of Tracie Barnes by Dr. Redlich, pg. 1 (attached exhibit 03).

CARD's involvement in Dr. Redlich's conclusions regarding Plaintiff Barnes is so prevalent, she begins her the section titled “Summary of Relevant Medical History” with the sentence “Mr. Barnes is a 63-year-old life-long non-smoker who was diagnosed with asbestos-related disease at the Center for Asbestos Related Disease (CARD).” *Id.*, pg. 2. Dr. Redlich then proceeds to recount for each of Plaintiff Barnes' CARD visits when Barnes reported to CARD, what symptoms he reported, the tests taken, the results of testing performed, and recommendations and diagnoses through at least nine follow-up visits from 2013 to 2018. *Id.*, pg 2-4. Specifically, Dr. Redlich relied on results of CARD pulmonary function tests from 2/6/2013, 2/20/2013, 2/19/2014, 3/9/2016, 5/25/2016, 1/25/2017, and

¹ Dr. Brad Black is a treating physician of all Plaintiffs. He claims to have seen and diagnosed all Plaintiffs with asbestos related diseases. Plaintiffs list the generic “treating physicians” on their expert disclosures. Thus, though Plaintiffs may not intend to call him as a witness, Defendant may do so without listing him separately on its own expert disclosures.

1/3/2018, as well as chest x-ray interpretations by Dr. Black from 2/6/2013, 2/19/2014, 3/9/2016, 4/20/2016, 7/6/2016, 1/25/2017, and 1/3/2018. *Id.*, at 8 (Pulmonary Function Test Chart); 12-14 (Chart of Chest X-Rays & CTs).

Dr. Redlich outlined Barnes' social, occupational, and environmental exposure to Libby Amphibole as she understands it based primarily on the reports of Drs. Hart and Marshall. *Id.*, pg. 4-6. For the reasons described below the reports of Drs. Hart and Marshall are also predicated on dubiously-sourced information originating at CARD.

Dr. Redlich then reaches her conclusion “**based on a careful review of his medical records...** Mr. Barnes has asbestos-related pleural disease.” *Id.*, at 6. She bases her conclusion on the “fact” that his medical records – again, originating mainly from CARD – identify a progressive respiratory condition that has worsened over the last five years. *Id.*, at 6-7. She concludes that such a progressively worsening condition is indicative of only an asbestos-related disease and that his condition can only be explained as a result of being exposed to Libby amphibole asbestos. *Id.*, at 7.

Dr. Redlich expert report of Rhonda Braaten

Dr. Redlich's report for Plaintiff Braaten also relies heavily on CARD medical records. (Expert Report of Rhonda Braaten by Dr. Redlich, pg. 2-8 (attached exhibit 04). Dr. Redlich based her expert opinions on medical records from – among other medical providers – CARD Clinic, as well as the expert reports of Dr. Hart, Dr. Marshall, Dr. Frank, Dr. Colella, Ms. Crowley, Ms. Walcheck, and Dr. Michael.

As Dr. Redlich notes “Mrs. Braaten first visited the CARD Clinic on 10/3/12” where “[h]er spirometry results were normal. Her chest X-Ray was read as normal. Her CT scan

from 8/23/12 was noted by CARD as showing thin pleural thickening and plaquing.” *Id.*, at 3. Plaintiff Braaten followed up with CARD on at least four other times between 2012 and 2015. *Id.* at 3-4. Dr. Redlich again relied on the results of CARD pulmonary function tests from 10/3/2012, 11/5/2013, 9/29/2014, 9/29/2015. *Id.*, at 10 (Pulmonary Function Tests Chart). Dr. Redlich also notes that CARD records also indicate family history of asbestos-related disease. *Id.*, at 5.

Dr. Redlich outlined Braaten’s occupational, and environmental exposure to Libby Amphibole as she understands it based primarily on the reports of Drs. Hart and Marshall. *Id.*, pg. 5-6. For the reasons described below the reports of Drs. Hart and Marshall are also predicated on dubiously-sourced information originating at CARD.

Dr. Redlich concludes that Braaten had “asbestos-related pleural disease [that] was first identified [by CARD Clinic] in October 2012. She was diagnosed with malignant mesothelioma in October 2016.” *Id.*, at 6. Dr. Redlich further indicates that Plaintiff Braaten’s “asbestos-related pleural disease ... increase[s] risk of other asbestos-related conditions.” *Id.* Dr. Redlich also notes that she considers Plaintiff’s ovarian cancer asbestos-related. *Id.* Dr. Redlich concluded “[b]ased on a careful review of her medical records, occupational and environmental history... [Plaintiff Braaten’s] exposure to Libby amphibole asbestos was a substantial contributing factor to the development of her ovarian cancer and mesothelioma, as well as her asbestos-related pleural disease.” *Id.*, at 8.

Dr. Redlich expert report of Gerrie Flores

Dr. Redlich’s expert opinions regarding Plaintiff Flores are similarly flawed for

basing her conclusions in part on the screening, diagnoses and treatment at CARD. Expert Report of Gerrie Flores by Dr. Redlich, pg. 2-8 (attached exhibit 05). Dr. Redlich again based her expert opinions on medical records from CARD Clinic, as well as the expert reports of Dr. Hart, Dr. Marshall, Dr. Frank, Ms. Crowley, and Ms. Walcheck.

Dr. Redlich reported

“[o]n August 12, 2015, at age 69 years Mrs. Flores had an initial screening at the CARD Clinic. At that time she reported having a cough, diminished exercise tolerance, and chest congestion. Her sons had reportedly been found to have asbestos-related disease, which raised her concerns that her symptoms may be asbestos related.”

Id., at 2. At that first visit, a chest CT was performed that found a lesion later-identified as lung adenocarcinoma. *Id.*

Dr. Redlich outlined Flores’s social, occupational, and environmental exposure to Libby Amphibole as she understands it based primarily on the reports of Drs. Hart and Marshall. *Id.*, pg. 3-5. For the reasons described below the reports of Drs. Hart and Marshall are also predicated on dubiously-sourced information originating at CARD.

In Dr. Redlich’s opinion Flores had “asbestos-related pleural disease” resulting from her exposure to Libby amphibole asbestos. *Id.* at 6. Dr. Redlich concluded “**[b]ased on a careful review of her medical records, occupational and environmental history...** [Plaintiff Braaten’s] exposure to Libby amphibole asbestos, incurred while living in the Libby area, was a substantial contributing cause of her lung cancer and her asbestos-related pleural disease.” *Id.*, at 6.

Hart Expert Report

Dr. Julie Hart’s expert report relies heavily on CARD Clinic, Dr. Black, and Mt.

Sinai research, as well the expert reports of Dr. Carrie Redlich, Dr. Arthur Frank, and Dr. Julian Marshall which are also based on CARD records. See Hart Expert Report, at 6 (Exhibit 06). Dr. Hart's report relies on information originating with Dr. Brad Black himself. Dr. Black co-authored at least two reports on which Dr. Hart relied, the Peipins et al (2003) article, *Id.* at 24; 132, and the Whitehouse et al (2008) article, *Id.* at 23-26; 137. Dr. Hart also relied on Dr. Whitehouse, the former CARD director, for another article, Whitehouse et al (2004). *Id.* at 25; 137.

As Dr. Hart describes after referencing these studies (among others),

These epidemiological studies demonstrate clear and significant increases in ARD, including asbestosis, lung cancer, and mesothelioma among industrial workers. In addition, ARD has been observed in area residents with no direct occupational exposures. The most common health outcome among Libby residents and others with low lifetime cumulative fiber exposure levels are pleural changes.

Id. at 24. Therefore Dr. Hart relies on Dr. Black and CARD to support her conclusions as they apply to the central liability and causation matters at issue in this case: that Libby asbestos is uniquely toxic even to those without direct occupational exposures, and that Libby asbestos causes the medical issues presented by Plaintiffs even at particularly low exposure levels.

BNSF will also note that Dr. Hart references "Miller et al., 2018" during a discussion of pleural diseases and progressive loss of pulmonary function and notes that "223 (87%) of the 256 miners had pleural thickening." Though "Miller et al 2018" does not appear in Hart's bibliography, BNSF presumes that this reference refers to "Libby Amphibole disease: Pulmonary Function and CT Abnormalities in Vermiculite Miners"

published in the Journal of Occupational Environmental Medicine 2018.² *Id.* at 25. This publication is particularly noteworthy as it was also co-authored by Dr. Brad Black, and furthermore by **eight** additional authors from the Icahn School of Medicine at Mt. Sinai: Drs. Miller, Szeniuk, Henschke, Yankelevitz, Liang, Liu, and Flores, and additional co-authors Yip, Linker. This is perfectly demonstrative of BNSF's argument – CARD, Dr. Black and Mt. Sinai are originating the medical literature on which Plaintiff's experts are basing their opinions.

Jennifer Crowley Life Care Plan Narrative for Tracie Barnes

Ms. Crowley drafted a Life Care Plan Narrative for Plaintiff Barnes based on the medical records of CARD Clinic and Dr. Black. See Life Care Plan Narrative for Barnes by Crowley (Exhibit 07). In her Life Care Plan Narrative, Crowley based her conclusions and findings on her on medical records from – among other medical providers – CARD Clinic, as well as the expert reports of Dr. Redlich (whose also-flawed basis for her medical conclusions are described above). *Id.* at 2.

Crowley describes Barnes' history of purported asbestos-related disease, diagnoses, and medical history including information from CARD records. *Id.* at 1; 3. She also notes both Dr. Black's current medical recommendations for Barnes, and prognosticates on Barnes' necessity for future medical care based on the current diagnoses arising out of CARD medical records. *Id.*, at 3-5. As Crowley reports

Barnes' visits to the CARD Clinic in Libby, MT will continue to be necessary.... He will require the use of medical supplies and

² J OCCUP ENVIRON MED. 2018 February ; 60(2): 167–173. doi:10.1097/JOM.0000000000001178, available for download at https://stacks.cdc.gov/view/cdc/51526/cdc_51526_DS1.pdf (author's manuscript).

equipment throughout life expectancy due to his condition, for use during times of increased pain, exacerbation of his condition or other illnesses which might impact his current state of health.

Id. at 5. However, Crowley's results are predicated on also-flawed data: "Dr. Carrie Redlich was consulted for the development of the recommendations and understanding of the projected needs." *Id.* As noted above, Dr. Redlich's conclusions regarding Barnes were also based on CARD information. Crowley notes Barnes will also have future expenses to monitor and treat his asbestos related disease that originated at CARD. *Id.* at 24 (Pulmonology monitoring); 26 (lab testing and imaging); 27 (Pulmonary testing); 37 (table of expected costs including CARD data). She further identifies CARD records for expenses related to past treatment of Barnes. *Id.* at 38-40.

Jennifer Crowley Life Care Plan Narrative for Rhonda Braaten

Ms. Crowley drafted a Life Care Plan Narrative for Plaintiff Braaten based on the medical records of CARD Clinic and Dr. Black. See Life Care Plan Narrative for Braaten by Crowley (Exhibit 08). In her Life Care Plan Narrative, Crowley based her conclusions and findings on her on medical records from – among other medical providers – CARD Clinic. *Id.* at 1-2. Crowley describes Braaten's history of purported asbestos-related diseases, diagnoses, and medical history including information from CARD records. *Id.* at 1. Crowley further identifies CARD records for expenses related to past treatment of Braaten occurring at CARD. *Id.* at 36-38; 43.

Jennifer Crowley Life Care Plan Narrative for Gerrie Flores

Ms. Crowley drafted a Life Care Plan Narrative for Plaintiff Flores based on the medical records of CARD Clinic and Dr. Black. See Life Care Plan Narrative for Flores

by Crowley (Exhibit 09). In her Life Care Plan Narrative, Crowley based her conclusions and findings on her on medical records from – among other medical providers – CARD Clinic, as well as the expert reports of Dr. Redlich (whose also-flawed basis for her medical conclusions are described above). *Id.* at 2-4.

Crowley describes Flores’ history of purported asbestos-related diseases, diagnoses, and medical history including information from CARD records. *Id.* at 1. Crowley further notes Flores will require have future expenses to monitor and treat his asbestos related disease that originated at CARD. *Id.* at 24 (Pulmonology monitoring); 26 (lab testing and imaging); 27 (Pulmonary testing); 37 (table of expected costs including CARD data). She further identifies CARD records for expenses related to past treatment of Flores. *Id.* at 38-40; 45.

Dee Walcheck Expert Report of Barnes

Vocational rehabilitation counselor Dee Walcheck drafted a vocational assessment on Plaintiff Barnes. See Vocational Employability Assessment for Barnes by Walcheck (Exhibit 10). Her assessment of his abilities is substantially predicated on medical assessment provided by Dr. Black, including pulmonary function tests performed at CARD as the basis for her assertions of disability. *Id.* at 1; 4. Walcheck is not a medical doctor. And as she notes, “[h]ad Mr. Barnes not been diagnosed with ARD, therefore forcing him to terminate his gainful employment early, he would have had the capacity to continue to earn Route Salesman wages.” *Id.* at 6. Therefore, her entire assessment of Plaintiff Barnes’ future earnings is based on *CARD*’s determination of his illness.

Dee Walcheck Expert Report of Braaten

Vocational rehabilitation counselor Dee Walcheck drafted a vocational assessment on Plaintiff Braaten. See Vocational Employability Assessment for Braaten by Walcheck (Exhibit 11). Her assessment of her abilities is again predicated on the medical diagnosis and impairment assessment provided by Dr. Black. *Id.* at 3-4. Walcheck is not a medical doctor. And as she opines based on this information from Dr. Black, “[h]ad Mrs. Braaten not been forced to terminate gainful employment early **due to the combination of her medical conditions**, she would have had the capacity to earn Assistant Manager/Retail Sales wages” *Id.* at 6. Therefore, her entire assessment of Plaintiff Braaten’s lost future earnings is based on CARD’s diagnoses of her asbestos related illness.

Reed Gunlickson Expert Report of Barnes Regarding Life Care Plan

Reed Gunlickson reviewed the Life Care Plan Report made by Jennifer Crowley for Tracie Barnes to base his report. See Gunlickson Report on Barnes Life Care Plan (Exhibit 12). As Crowley’s report is based on information from CARD, as well as a report by Dr. Redlich also based on information from CARD as outlined above, the conclusions of Gunlickson as he applies them to Barnes are also flawed. *Id.* at 1-2.

Reed Gunlickson Expert Report of Barnes Regarding Vocational Assessment

Reed Gunlickson reviewed the Vocational Assessment Report made by Dee Walcheck for Tracie Barnes to base his report. See Gunlickson Report on Barnes Vocational Assessment (Exhibit 13). As Walcheck’s report is based on information from CARD as outlined above, the conclusions of Gunlickson as he applies them to Barnes are also flawed. *Id.* at 1-2.

Reed Gunlickson Expert Report of Braaten

Reed Gunlickson reviewed the Life Care Plan Report made by Jennifer Crowley for Rhonda Braaten to base his report. See Gunlickson Report on Braaten (Exhibit 14). As Crowley's report is based on information from CARD, as outlined above, the conclusions of Gunlickson as he applies them to Braaten are also flawed. *Id.* at 1-2.

Reed Gunlickson Expert Report of Flores

Reed Gunlickson reviewed the Life Care Plan Report made by Jennifer Crowley for Gerrie Flores to base his report. See Gunlickson Report on Flores (Exhibit 15). As Crowley's report is based on information from CARD, as well as a report by Dr. Redlich also based on information from CARD as outlined above, the conclusions of Gunlickson as he applies them to Flores are also flawed. *Id.* at 1-2.

Frank Expert Report of Braaten

Dr. Frank's report for Plaintiff Braaten relies heavily on CARD medical records. (Expert Report of Rhonda Braaten by Dr. Frank, at 1-2 (attached exhibit 16). As Dr. Frank described, "after being seen at the CARD clinic, [Braaten] was diagnosed with asbestos-related pleural disease." Dr. Frank then concludes that "based upon [the records he] review[ed]... Ms. Braaten suffered from three asbestos-related conditions" arising out of asbestos exposures occurring in Libby, MT. *Id.* at 2.

Frank Expert Report of Flores

Dr. Frank's report for Plaintiff Flores relies heavily on CARD medical records. (Expert Report of Gerrie Flores by Dr. Frank, at 1-2 (attached exhibit 17). As Dr. Frank described, "[i]n August 2015, having been seen at the CARD Clinic, Dr. Black found an irregular density on CT scan of the chest as well as some circumscribed plaque." Dr. Frank

concludes that “based upon [the records he] review[ed]... Ms. Flores suffered from two asbestos-related conditions” arising out of asbestos exposures occurring in Libby: asbestos-related pleural disease, and adenocarcinoma of the lung. *Id.* at 1-2.

Marshall Expert Report

Dr. Julian Marshall relied, at least in part, on the expert report of Dr. Julie Hart in forming his rebuttal expert opinions. See Marshall Expert Report (Exhibit 18). Dr. Hart’s report is based on information from CARD, Dr. Black, and Mt. Sinai as described above. *Id.* at 16-17; 20-24; 78. Therefore the conclusions he reaches as they relate to this matter are also flawed.

Marshall Rebuttal Expert Report

Dr. Julian Marshall relied, at least in part, on the expert report of Dr. Julie Hart in forming his rebuttal expert opinions. See Marshall Rebuttal Report (Exhibit 19). Dr. Hart’s report is based on information from CARD, Dr. Black, and Mt. Sinai as described above. *Id.* at 19; 23; 27; 32. Therefore the conclusions he reaches as they relate to this matter are also flawed.

Colella Rebuttal Expert Report of Barnes

Dr. Mark Colella reviewed the medical report made by Dr. Carrie Redlich for Tracie Barnes to base his expert rebuttal report. See Colella Report on Barnes (Exhibit 20). As Dr. Redlich’s report is based on information from CARD as outlined above, the conclusions of Colella’s as he applies them to Barnes are also flawed. *Id.* at 1-2.

Michael Rebuttal Expert Report

Dr. Claire Michael relied, at least in part, on the expert reports of Drs. Colella and

Redlich in her rebuttal report. See Michael Rebuttal Report (Exhibit 21). As Dr. Redlich's and Dr. Colella's reports are based on information from CARD as outlined above, the conclusions of Dr. Michael as she applies them to Braaten are also flawed. *Id.* at 1-2.

b. Plaintiffs are not offering CARD and Mt. Sinai witnesses specifically to avoid this evidence being known to the jury.

It is important to note that the sole reason Plaintiffs have abandoned the medical diagnoses, medical records, and expert opinions of Dr. Black, CARD Clinic, and Mt. Sinai witnesses is to attempt to avoid this highly relevant information from appearing before a jury. As this Court will vividly recall, less than four months ago, two days of the Court's time was spent by Plaintiffs defending Dr. Black and CARD's findings for the universe of the Asbestos Claims Court plaintiffs, and asserting through Dr. Black that Libby asbestos disease was so unique that only Dr. Black could see it. That hearing was held for the purpose of substantiating Dr. Black and CARD as the primary medical witnesses in the Asbestos Claims Court cases. Now that Dr. Black and CARD's credibility has been called into question by the financial relationship with Plaintiffs' counsel, Plaintiffs have located new witnesses to present their medical opinions who incredibly can now see this unique asbestos disease. However, those expert opinions suffer from the same poisonous root that impairs Dr. Black and all other CARD witnesses. The matter is transitive. Where his credibility is at issue, so too is the credibility of records and articles he has created. Plaintiffs cannot obviate the credibility problem of Dr. Black and CARD Clinic merely by having the same dubious medical records, interpretations and literature reviewed by a new expert.

c. The matter of CARD finances is highly probative because it goes directly to the credibility of Plaintiffs' expert opinions offered in this case, therefore its probative value outweighs its prejudicial effect.

Evidence of CARD Clinic's finances and relationship with Plaintiffs' attorneys is more probative than prejudicial. Relevant evidence may be properly excluded if its probative value is substantially outweighed by its prejudicial effect. Mont. R. Evid. 403. Whether the diagnoses, prior medical treatment, and medical literature underlying the Libby asbestos-related disease diagnoses of the Plaintiffs are based on credible and reliable information is highly probative and relevant to the case at bar where Plaintiffs allege injury arising out of exposure to the purportedly highly toxic Libby amphibole. It is true that a financial relationship between Plaintiffs' attorneys and CARD Clinic has a prejudicial effect; all forms of evidence have some prejudice against some party. However, the probative value outweighs the prejudice Plaintiffs will experience. Plaintiffs' counsel themselves understand that financial relationships can lead to inferences regarding credibility. (*See e.g.* Asbestos Claims Court Tr. Hr'g., at 159:4-161:1, July 24, 2018 (Plaintiffs' counsel from MHSL questioning Defense Expert Witness Dr. David Weill regarding his hourly and annual income related to his expert services in litigation.) (attached Exhibit 22)). Here, Plaintiffs' counsel seeks to have its own financial entanglements with Dr. Black, CARD, and Mt. Sinai excluded. But just as Dr. Weill's credibility is properly weighed in light of his hourly rate and annual income arising from his expert services, so too is the financial relationship between CARD and Plaintiffs' counsel.

Also, Plaintiffs cannot have prejudicial evidence excluded when the prejudice exists

due to the actions of their own attorneys.³ Such an outcome would vexatiously permit the Plaintiffs to benefit from the questionable conduct of their own attorneys, which is an illogical result. The corollary demonstrating the inanity of such a result, exists in spirit in the doctrine of invited error. Invited error doctrine holds that the conduct of counsel during trial that invites error against their own client will not be sufficient grounds for overturning a result. See *State v. Favel*, 2015 MT 336, P33, 381 Mont. 472 (2015); *Thorton v. Alpine Home Center*, 2001 Mont. Dist. LEXIS 3449, *7 (2001). Here, too, Plaintiffs cannot seek to exclude evidence as overly prejudicial on the grounds that their own counsel have created the prejudice.

2. Plaintiffs' Diseases, In Spite Of Plaintiff's Assertions To The Contrary, Are Disputed In This Case.

Plaintiffs also incorrectly assert in their *Motion in Limine* that Plaintiffs' alleged asbestos related diseases are not a matter in controversy in this case. This assertion is untrue. Gerrie Flores alleges a lung cancer resulting from asbestos exposure. However, Gerrie Flores was a smoker, which is a known major cause of lung cancer. Rhonda Braaten, through her personal representative Kenneth Braaten, alleges mesothelioma resulting from asbestos exposure. However, she died from ovarian cancer. And Terri Barnes alleges an

³ Plaintiffs attempt to imply that Defendants were required to move for the disqualification of Plaintiffs' counsel prior to the date of the Asbestos Claims Court's deadline for such motion – what Plaintiffs repeatedly refer to as BNSF's failure to comply with the Court's deadline - lest Defendants be barred from presenting the underlying issues in open court ever after. As BNSF stated in the hearing of September 18, 2018, it was troubled by what had already been discovered and needed more time and discovery to identify the scope of the financial relationship at issue. The Court ultimately denied BNSF's request for additional time to conduct discovery on such matters, and accordingly the deadline passed. BNSF chose not to move for disqualification on the incomplete discovery that had been done, it did not "[choose] not to comply" as Plaintiffs suggest in their *Motion in Limine*. The issue of whether or not an attorney is properly disqualified is an entirely different analysis as to whether or not that same conduct has evidentiary value as a measure of credibility for a witness.

asbestos-related fibrosis. However, he suffers from a fibrosis that is more likely related to rheumatological causes.

Beyond merely the current alleged dispute in diseases that these Plaintiffs are suffering (or did suffer in the case of Ms. Braaten) from, these matters go to the very heart of why the impartiality or lack thereof of CARD Clinic diagnoses and treatment is relevant in all Asbestos Claims Court cases. All Plaintiffs allege substantial lung impairment of the pleura created by this uniquely toxic Libby amphibole which CARD Clinic, Mt. Sinai, and Dr. Black claim to have studied and written about extensively. For Plaintiffs to now suggest that the substantial lung impairment diagnosed and treated by CARD Clinic, and studied by Dr. Black and Mt. Sinai is not relevant to whether or not these Plaintiffs suffer from any asbestos related condition is incorrect. And Plaintiffs attempts to do so in the same breath that they propose experts relying on the records, diagnoses, and medical literature generated by the same sources are reliable is incongruous.

Plaintiffs themselves raise a major relevant concern with this position in their *Motion in Limine*: statute of limitations. Plaintiffs incorrectly aver that Defendant has not made any statute of limitations defense in this matter. However, it has. BNSF Ans. to 3rd Am. Compl., Affirmative Defenses ¶ 3 (attached Exhibit 23). Montana statute states that the statute of limitations does not begin to run “until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party.” MCA § 27-2-102. Terri Barnes, by way of example, was advised by his non-CARD-affiliated physician in 2010 to get screened for asbestos exposure. He did not seek screening until 2013 and did not file his suit until 2018. The relevant question then

becomes when Mr. Barnes should have known about his purported asbestos-related disease that he now asserts. Whether or not such disease reliably exists is not relevant to the matter of whether or not his suit is timely under Montana's discovery rule.

CONCLUSION

As evidence of Plaintiffs' counsel financial involvement with CARD Clinic, CARD Foundation, Dr. Black, and Mt. Sinai raise legitimate questions of credibility of the medical records and diagnoses that Plaintiffs' experts rely on to generate their opinions, the financial relationship is relevant and properly admissible. Furthermore, those same issues are highly probative and are not substantially overcome by their prejudicial effect. Finally, despite Plaintiffs' assertions otherwise, the diagnoses and conditions of Plaintiffs are at issue and therefore the initial diagnosis and treatment is central to the issues presented.

For these reasons BNSF asks that the Court deny Plaintiffs' *Motion in Limine re: CARD's Finances and Relationship with Attorneys*.

Knight Nicastro, LLC

Respectfully submitted,

s/ Chad M. Knight

Chad Knight

Anthony Nicastro

Nadia Patrick

Attorneys for BNSF Railway Co. and John Swing

CERTIFICATE OF SERVICE

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 on this 16th day of November, 2018:

Roger M. Sullivan
Allan M. McGarvey
Ethan A. Welder
Jinnifer J. Mariman
McGarvey, Heberling, Sullivan & Lacey, P.C.
345 1st Avenue E
Kalispell MT 59901
Counsel for Plaintiffs
Service Method: eService

Dale R. Cockrell
Katherine A. Matic
Moore, Cockrell, Goicoechea & Johnson, P.C.
P.O. Box 7370
Kalispell, MT 59904-0370
Counsel for State of Montana
Service Method: eService

s/ Chad M. Knight

CERTIFICATE OF SERVICE

I, Nadia Hafeez Patrick, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 11-16-2018:

Amy Poehling Eddy (Attorney)
920 South Main
Kalispell MT 59901
Representing: Amy Eddy
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Allan M. McGarvey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Jon L. Heberling (Attorney)
345 First Ave E
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

John F. Lacey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Ethan Aubrey Welder (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Jeffrey R. Kuchel (Attorney)
305 South 4th Street East
Suite 100
Missoula MT 59801
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Danielle A.R. Coffman (Attorney)
1667 Whitefish Stage Rd
Kalispell MT 59901
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Gary M. Zadick (Attorney)
P.O. Box 1746
#2 Railroad Square, Suite B
Great Falls MT 59403
Representing: Honeywell International
Service Method: eService

Gerry P. Fagan (Attorney)
27 North 27th Street, Suite 1900
P O Box 2559
Billings MT 59103-2559
Representing: CNH Industrial America LLC
Service Method: eService

G. Patrick HagEstad (Attorney)
PO Box 4947
Missoula MT 59806
Representing: Crane Co., United Conveyor Corporation, Riley Stoker Corporation et al
Service Method: eService

Rachel Hendershot Parkin (Attorney)
PO Box 4947
Missoula MT 59806
Representing: Crane Co.
Service Method: eService

Mark Andrew Thieszen (Attorney)
Poore Roth & Robinson, P.C.

1341 Harrison Ave
Butte MT 59701
Representing: The William Powell Company, Atlantic Richfield Company, et al
Service Method: eService

Patrick M. Sullivan (Attorney)
1341 Harrison Ave
Butte MT 59701
Representing: The William Powell Company, Atlantic Richfield Company, et al
Service Method: eService

Jennifer Marie Studebaker (Attorney)
210 East Capitol Street
Suite 2200
Jackson MS 39201
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Joshua Alexander Leggett (Attorney)
210 East Capitol Street, Suite 2200
Jackson MS 39201-2375
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Vernon M. McFarland (Attorney)
200 South Lamar Street, Suite 100
Jackson MS 39201-4099
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Jean Elizabeth Faure (Attorney)
P.O. Box 2466
1314 Central Avenue
Great Falls MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec
LLC, International Paper Co.
Service Method: eService

Jason Trinity Holden (Attorney)
1314 CENTRAL AVE
P.O. BOX 2466
Montana
GREAT FALLS MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec
LLC, International Paper Co.
Service Method: eService

Chad E. Adams (Attorney)
PO Box 1697

Helena MT 59624

Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.

Service Method: eService

Katie Rose Ranta (Attorney)

Faure Holden, Attorneys at Law, P.C.

1314 Central Avenue

P.O. Box 2466

GREAT FALLS MT 59403

Representing: Borg Warner Morse Tec LLC

Service Method: eService

John Patrick Davis (Attorney)

1341 Harrison Avenue

Butte MT 59701

Representing: Atlantic Richfield Company, et al

Service Method: eService

Stephen Dolan Bell (Attorney)

Dorsey & Whitney LLP

125 Bank Street

Suite 600

Missoula MT 59802

Representing: Ford Motor Company

Service Method: eService

Dan R. Larsen (Attorney)

Dorsey & Whitney LLP

111 South Main

Suite 2100

Salt Lake City UT 84111

Representing: Ford Motor Company

Service Method: eService

Kelly Gallinger (Attorney)

315 North 24th Street

Billings MT 59101

Representing: Maryland Casualty Corporation

Service Method: eService

Charles J. Seifert (Attorney)

P.O. Box 598

Helena MT 59624

Representing: Ford Motor Company, Maryland Casualty Corporation

Service Method: eService

Robert J. Phillips (Attorney)

Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Emma Laughlin Mediak (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Daniel Jordan Auerbach (Attorney)
201 West Railroad St., Suite 300
Missoula MT 59802
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company
Service Method: eService

Leo Sean Ward (Attorney)
PO Box 1697
Helena MT 59624
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.
Service Method: eService

Robert B. Pfennigs (Attorney)
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Rick A. Regh (Attorney)
P.O. Box 2269
GREAT FALLS MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Mark Trevor Wilson (Attorney)
300 Central Ave.
7th Floor
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Robert M. Murdo (Attorney)
203 North Ewing

Helena MT 59601
Representing: Mine Safety Appliance Company LLC
Service Method: eService

Murry Warhank (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Mine Safety Appliance Company LLC
Service Method: eService

Ben A. Snipes (Attorney)
Kovacich Snipes, PC
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Mark M. Kovacich (Attorney)
Kovacich Snipes, PC
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Ross Thomas Johnson (Attorney)
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Randy J. Cox (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: A.W. Chesterson Company
Service Method: eService

Zachary Aaron Franz (Attorney)
201 W. Main St.
Suite 300
Missoula MT 59802
Representing: A.W. Chesterson Company
Service Method: eService

M. Covey Morris (Attorney)
Tabor Center
1200 Seventeenth St., Ste. 1900
Denver CO 80202
Representing: FMC Corporation
Service Method: eService

Robert J. Sullivan (Attorney)
PO Box 9199
Missoula MT 59807
Representing: Ingersoll-Rand, Co.
Service Method: eService

Dale R. Cockrell (Attorney)
145 Commons Loop, Suite 200
P.O. Box 7370
Kalispell MT 59904
Representing: State of Montana
Service Method: eService

Vaughn A. Crawford (Attorney)
SNELL & WILMER, L.L.P.
400 East Van Buren
Suite 1900
Phoenix AZ 85004
Representing: The Proctor & Gamble Company et al
Service Method: eService

Tracy H. Fowler (Attorney)
15 West South Temple
Suite 1200
South Jordan UT 84101
Representing: The Proctor & Gamble Company et al
Service Method: eService

Martin S. King (Attorney)
321 West Broadway, Suite 300
P.O. Box 4747
Missoula MT 59806
Representing: Foster Wheeler Energy Services, Inc.
Service Method: eService

Maxon R. Davis (Attorney)
P.O. Box 2103
Great Falls MT 59403
Representing: Continental Casualty Company
Service Method: eService

Tom L. Lewis (Attorney)
2715 Park Garden Lane
Great Falls MT 59404
Representing: Harold N. Samples
Service Method: eService

Keith Edward Ekstrom (Attorney)

601 Carlson Parkway #995
Minnetonka MN 55305
Representing: Brent Wetsch
Service Method: eService

William Rossbach (Attorney)
401 N. Washington
P. O. Box 8988
Missoula MT 59807
Representing: Michael Letasky
Service Method: eService

Kennedy C. Ramos (Attorney)
1717 Pennsylvania Avenue NW
1200
wash DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Edward J. Longosz (Attorney)
1717 Pennsylvania Avenue NW
Suite 1200
Washington DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Chad M. Knight (Attorney)
929 Pearl Street
Ste. 350
Boulder CO 80302
Representing: BNSF Railway Company
Service Method: eService

Anthony Michael Nicastro (Attorney)
401 North 31st Street
Suite 770
Billings MT 59101
Representing: BNSF Railway Company
Service Method: eService

Kevin A. Twidwell (Attorney)
1911 South Higgins Ave
PO Box 9312
Missoula MT 59807
Representing: Libby School District #4
Service Method: eService

Jinnifer Jeresek Mariman (Attorney)
345 First Avenue East

Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Stephanie A. Hollar (Attorney)
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company
Service Method: eService

James E. Roberts (Attorney)
238 W Front Street
Suite 203
Missoula MT 59802
Representing: BNSF Railway Company
Service Method: eService

Michael Crill (Other)
PO Box 145
Rimrock AZ 86335
Service Method: Conventional

Michael D. Plachy (Attorney)
1200 17th Street
Denver CO 80202
Representing: Honeywell International
Service Method: Conventional

Conor A. Flanigan (Attorney)
1200 17th Street
Denver CO 80202
Representing: Honeywell International
Service Method: Conventional

Fredric A. Bremseth (Attorney)
601 Carlson Parkway, Suite 995
Minnetonka MN 55305-5232
Representing: Brent Wetsch
Service Method: Conventional

Walter G. Watkins (Attorney)
210 E. Capitol Street, Ste. 2200
Jackson MS 39201
Representing: International Paper Co.
Service Method: Conventional

Jason Eric Pepe (Attorney)
519 Southwest Boulevard
Kansas City MO 64108

Representing: BNSF Railway Company
Service Method: Conventional

Peter A. Moir (Attorney)
701 Poydras Street, Suite 2200
New Orleans LA 70139-6001
Representing: International Paper Co.
Service Method: Conventional

Mark A. Johnston (Attorney)
1717 Pennsylvania Ave. NW, 12th Floor
Washington DC 20006
Representing: Maryland Casualty Corporation
Service Method: Conventional

Erik H Nelson (Attorney)
519 Southwest Boulevard
Kansas City MO 64108
Representing: BNSF Railway Company
Service Method: Conventional

Michael E. Wise (Attorney)
519 Southwest Boulevard
Kansas City MO 64108
Representing: BNSF Railway Company
Service Method: Conventional

Electronically Signed By: Nadia Hafeez Patrick
Dated: 11-16-2018