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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,	**Cause No. AC 17-0694** **DEFENDANT BNSF RAILWAY COMPANY'S AND JOHN SWING'S REPLY SUGGESTIONS IN SUPPORT OF THEIR MOTION IN LIMINE REGARDING IRRELEVANT NONPARTY CLAIMS OR DISEASES** ***Applies to Barnes, et al. v. State of Montana, et al.***

Defendants BNSF Railway Company and John Swing (collectively "the BNSF Defendants"), for their *Reply Suggestions in Support of Their Motion in Limine Regarding Irrelevant Nonparty Claims or Diseases,* state as follows:

I. PLAINTIFFS CONCEDE THEY SEEK TO USE NONPARTY EVIDENCE FOR THE IMPROPER PURPOSE OF PROVING NEGLIGENCE THEREFORE ANY SUCH EVIDENCE SHOULD BE EXCLUDED

In their Response, Plaintiffs admit that they intend to call several non-party witnesses to testify regarding their separate and unrelated incidents of alleged asbestos exposure in the Libby community. See *Plaintiffs' Response to BNSF's Motion In Limine Re: Irrelevant NonParty Claims or Diseases (*hereinafter "Plaintiffs' Response"), *pp. 1-3.*

Plaintiffs claim the testimony of the non-party witnesses would "[make] it more probable ….that the Plaintiffs experienced the exposure they allege in this case." *Plaintiffs' Response*, pp. 2-3. In sum, Plaintiffs admit that they intend to present this evidence in an attempt to prove that it is more likely Defendants' negligence caused Plaintiffs' alleged exposures, rather than some other third party source. However, evidence of other incidents, or accidents, is not admissible to show negligence. See *Daley v. BNSF Ry*., 2018 MT 197, ¶6-¶7, 392 Mont. 311 (2018); See also *Falconbridge v. State*, 2006 MT 198, ¶ 30, 333 Mont. 186 (2006). This is precisely what Plaintiffs are attempting to do here – use this evidence to prove negligence – which is expressly prohibited under Montana law.

Plaintiffs ask this Court, on the one hand, to allow them to parade numerous non-party witnesses into the courtroom to discuss their separate, and unrelated, incidents of alleged asbestos exposure. On the other hand, they contend Defendants should be precluded from demonstrating that those very witnesses have no asbestos related disease. See *Plaintiffs' Response to BNSF's Motion In Limine Re: Various Evidentiary Issues*, p. 5 (arguing that BNSF should not be able to imply to the jury that "[Plaintiffs' nonparty witnesses] do not have disease like that being claimed by Plaintiffs."). Plaintiffs cannot have it both ways and the Court should simply preclude Plaintiffs from calling any such witness to testify to avoid confusion and misleading the jury.

Interestingly, Plaintiffs do not provide the identities of the nonparty witnesses they intend to call. *Plaintiffs' Response* at pp. 2-3. Nor do they identify how many of these witnesses they intend to call at trial. *Id***.** Plaintiffs provide no specific facts about what each witness would testify to, and fail to provide any details concerning the non-party witnesses' claimed exposures. *Id* at pp. 2-3. In sum, Plaintiffs intend to call these unnamed "mystery" witnesses at trial to testify about vague, undisclosed, and prejudicial testimony when Plaintiffs have already identified well over 70

potential trial witnesses that they have indeed disclosed. Plaintiffs seek to surprise Defendants at trial with improper, prejudicial testimony, but the Montana legal system "is not a poker game" in which parties enjoy an absolute right to conceal "their cards until played." *State v. Carter*, 2014 MT 65, ¶12, 374 Mont. 206 (2014). Plaintiffs should be precluded from presenting any such evidence and the BNSF Defendants' motion in limine should be granted.

II. "MINI-TRIALS" CONCERNING ALLEGED NONPARTY EXPOSURES, CLAIMS, AND DISEASES WILL RESULT FROM PLAINTIFFS' PROPOSED EVIDENCE CAUSING JUROR CONFUSION AND PREJUDICE

Plaintiffs claim there will be no unfair prejudice or jury confusion if they are allowed to present evidence of the alleged nonparty asbestos exposures. *Plaintiffs' Response*, p. 3. Plaintiffs provide no basis or explanation for their position, and they have provided no case law where such a scenario is permitted. *Id***.**

Montana courts have held that evidence of nonparty claims, incidents, or injuries would result in multiple "mini-trials" within the trial of a case, and that the same would lead to jury confusion and prejudice. See *Wright v. W.R. Grace & Co*., 1997 Mont. Dist. LEXIS 897, No. DV-96-169 (attached as "**Exhibit A"** to the BNSF Defendants' initial motion). In *Wright*, the plaintiffs claimed Mr. Wright was exposed to asbestos during the course of his employment with W.R. Grace & Co., and that he contracted asbestosis as a result. The plaintiffs in *Wright* asked the court to permit them to introduce evidence concerning other nonparty employees' asbestos exposures and alleged injuries. Id. *1-*2. However, the *Wright* court held that the fact that other employees had suffered harm was "irrelevant" to the plaintiffs' claims. Id. at *11. The court also noted that, even if the evidence were relevant, it should be excluded under Montana Rule of Evidence 403 because such evidence would result in multiple "mini-trials" and the same would confuse and mislead the jury. Id. at *14-*16. ("if the Court were to permit evidence of injury suffered by others, there arises

the prospect of multiple 'mini-trials' within the single case…[i]n the Court's view, this could create a nightmare wherein cross-examination is focusing on individuals and injuries that are not even part of the case being considered by the jury.")

Montana Rule of Evidence 403 was modeled after Federal Rule of Evidence 403. *State v. District Court of Eighteenth Judicial Dist. of Montana*, 2010 MT 263, ¶47, note 4, 358 Mont. 325 (2010). Cases discussing Federal Rule 403 are persuasive authority. Id. Several courts have found that when the proposed evidence would lead to a "trial within a trial" such evidence results in prejudice, juror confusion, and that the same should be excluded under Rule 403. See, e.g., *United States v. Aboumoussallem,* 726 F.2d 906, 912 (2d Cir.1984) (upholding exclusion of testimony to avoid "trial within a trial"); *United States v. Al Kassar,* 582 F.Supp.2d 498, 500 (S.D.N.Y.2008), *aff'd,* 660 F.3d 108, 123–124 (2d Cir.2011) ("[T]he situations are not, on their face, analogous, and it would require a trial within a trial before the jury could determine whether there was any meaningful analogy at all."); *ESPN, Inc. v. Office of Comm'r of Baseball,* 76 F.Supp.2d 383, 407 (S.D.N.Y.1999) ("The probative value of such an exercise is vastly outweighed by the confusion and delay that would inevitably result from conducting a trial within a trial."); see also *Beastie Boys v. Monster Energy Co*., 983 F. Supp.2d 354, 358-59 (S.D.N.Y 2014)(noting that Rule 403 disfavors evidence creating a "trial within a trial").

Plaintiffs' presentation of evidence concerning nonparty claims, lawsuits, exposures or diseases would require Defendants to present rebuttal evidence to dispute the nonparty evidence. This, in turn, would create a scenario where both parties would be required to prove or disprove the validity of unrelated nonparty claims in the middle of trial, and the same would lead to the very confusion Rule 403 disfavors. Plaintiffs have provided no case law, or valid reason, to demonstrate otherwise. The BNSF Defendants' motion in limine should be granted.

III. DEFENDANTS' EXAMINATION OF WITNESSES CONCERNING PLAINTIFFS' COUNSEL'S PRIOR REPRESENTATION, OR PRIOR RETENTION, OF SAID WITNESSES DOES NOT "OPEN THE DOOR" TO EVIDENCE OF IRRELEVANT NONPARTY EVIDENCE

Plaintiffs contend that if Defendants "open the door" to evidence of nonparty claims, lawsuits, or incidents of exposure, Plaintiffs should have the opportunity to present such evidence to the jury. *Plaintiffs' Response*, p. 4. Defendants have no intention of "opening the door" to such evidence, however, Plaintiffs suggest that if Defendants cross-examine any witness concerning Plaintiffs' counsel's prior representation, or retention, of the witnesses, this type of cross-examination would "open the door." *Plaintiffs' Response*, pp. 4-5. Plaintiffs' argument is without merit. Inquiry on cross-examination should be allowed as wide range as may be reasonably necessary to test the skill, reliability, and credibility of the witness. *Green v. Hagele*, 182 Mont. 155, 159 (1979).

A party is permitted to elicit facts relevant to the credibility and potential bias of a witness. *Daley v. BNSF Ry*., 2018 MT 197, ¶33, 392 Mont. 311 (2018). See also M. R. Evid. 401. In *Daley*, the Montana Supreme Court found that the trial court did not abuse its discretion in allowing defense counsel to test the credibility of plaintiff's experts by examining the experts about the hundreds of cases they previously worked on for plaintiff's counsel, as well as golf outings they had participated in with the plaintiff's counsel. Id. at 2018 MT 197, ¶32 and ¶33. The trial court in *Daley* found that such cross examination was proper, and that the same did not open the door to a "mini-trial" on unrelated nonparty cases and claims. The trial court's ruling was upheld by the Montana Supreme Court. *Id*.

Other courts have indicated that this type of examination does not "open the door" to evidence of nonparty claims, lawsuits, or incidents. See *Unicolors, Inc. v. Urban Outfitters, Inc*., 686 Fed. Appx. 422, 425 (9th Cir. 2017)(questioning of opposing party's expert about being

previously retained by opposing counsel did not violate *in limine* order regarding preclusion of evidence of prior lawsuits).

Defendants should be allowed to test the credibility of Plaintiffs' witnesses and experts by examining them about Plaintiffs' counsel's prior representation, or retention, of such witnesses. This type of examination does not "open the door" to evidence of nonparty claims, lawsuits, exposures or diseases. Therefore, the BNSF Defendants' motion should be granted, and Plaintiffs' request on this issue denied.

IV. PLAINTIFFS' VAGUE REFERENCE TO "EPIDEMIOLOGICAL EVIDENCE RELATED TO LIBBY ASBESTOS DISEASE" DOES NOT SUPPORT A DENIAL OF DEFENDANTS' MOTION IN LIMINE

Plaintiffs contend that Defendants' motion in limine should not preclude "peer-reviewed evidence by Plaintiffs' experts" concerning "epidemiological evidence" about Libby asbestos disease. *Plaintiffs' Response*, p. 5**.**

Plaintiffs wholly fail to identify or explain exactly what evidence Plaintiffs are referring to in this regard. Since Plaintiffs have not provided any clear support for their position, or specific evidence regarding what they are referring to, the BNSF Defendants' motion in limine should be granted, and Plaintiffs' request on this issue denied.

V. CONCLUSION

WHEREFORE, Defendants request that the Court grant their *Motion in Limine Regarding Irrelevant Nonparty Claims or Diseases*, and that the Court preclude the admission of or reference to any evidence concerning the alleged claims, exposures, diseases or injuries of nonparties. **Further, Defendants request an Oral Argument on the aforementioned *Motion In Limine.***

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Respectfully submitted,

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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 30th day of November, 2018.

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