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STATE OF MONTANA
Case Number: AC 17-0694

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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,

)
) **Cause No. AC 17-0694**
)
) **DEFENDANTS BNSF RAILWAY**
) **COMPANY'S AND JOHN SWING'S**
) **COMBINED REPLY IN SUPPORT OF**
) **MOTION FOR ADDITIONAL TIME**
) **FOR REBUTTAL EXPERT**
) **DISCLOSURES AND TO ENLARGE**
) **THE NUMBER OF AVAILABLE**
) **DEPOSITIONS AND BRIEF IN**
) **SUPPORT**
)
) *Applies to Barnes, et al. v. State of*
) *Montana, et al. DV-16-111*
)

COME NOW Defendants BNSF Railway Company ("BNSF") and John Swing, by and through the undersigned counsel, and file this *Reply in Support of Motion for Additional Time for Rebuttal Expert Disclosures and to Enlarge the Number of Available Depositions and Brief in Support*.

INTRODUCTION

Three separate plaintiffs are pursuing independent claims against BNSF and seeking substantial awards. Plaintiff Tracey Barnes is seeking \$928,193 in economic damages alone. *See Exhibits A, B, C, and D*, Reports of Reed Gunlikson. Plaintiff Rhonda Braaten seeks \$561,000,

and Gerri Flores seeks \$698,542 in economic damages alone. While these cases are consolidated in discovery, and there are some efficiencies associated with that, these are distinct claimants with distinct medical conditions at issue, distinct medical histories, distinct exposure histories, and distinct facts affecting central issues of liability. These are distinct lawsuits. BNSF has acted diligently from the outset of this litigation to attempt to keep an aggressive schedule and has sought no relief that was not justified by the circumstances.

1. BNSF and its attorneys have acted diligently since the inception of this litigation.

As an initial matter, BNSF must clarify this with the Court. These parties, including the attorneys for these parties, have not tried one of these cases before. This is the first.¹ As such, much ground is being plowed for the first time. In particular, Defendants respectfully disagree with this Court's finding in its November 14, 2018 order, that BNSF failed "to appropriately prepare and anticipate the necessary experts." To the contrary, BNSF retained and prepared experts on the following subjects as a part of its initial disclosure of expert witnesses: (1) state of the art, (2) industrial hygiene and toxicology, (3) epidemiology, (4) oncology, including a specialist in gynecological oncology, (5) pathology, including a specialist in gynecological pathology, (6) pulmonology and radiology, and (7) forensic accounting.

Defendants further anticipated that Plaintiffs may designate an expert in air modeling. Defendants believe this type of modeling is unreliable and inaccurate and for this reason did not seek to conduct air modeling as a part of affirmative expert opinions. However, anticipating Plaintiff's potential designations, Defendants proactively retained an expert to be prepared to review and critique any purported air model disclosed by Plaintiffs. This expert, Heather Avens,

¹ The counsel involved in this case began litigating a case styled *Watson v. BNSF*, which was dismissed at the summary judgment stage and did not proceed through trial. Defense counsel was also involved in a trial styled *Wetsch v. BNSF*. That plaintiff was not represented by counsel for these plaintiffs and the approach to prosecuting the case has been decidedly different.

Ph.D., began preparing for this work prior to even receiving Plaintiff's designation in anticipation of this potentiality. After Plaintiffs disclosed their expert reports on October 26, 2018, Dr. Avens began working in earnest to review and evaluate the 106 page report and calculations of Plaintiff's air modeling expert, Julian Marshall, Ph.D. Dr. Marshall's report contains three separate complex air models applicable to three separate plaintiffs, taking into account their distinct residence histories and locations. Dr. Marshall's report was premised in large part on the 138 page report of Plaintiffs' expert, Julie Hart, Ph.D., requiring Dr. Avens to review and analyze this report, which includes 511 referenced documents, of which 398 were articles or studies. In order to allow Dr. Avens to complete this work related to these three separate Plaintiffs, Defendants requested an extension of seven additional work days to November 26, 2019 to complete rebuttal reports. Taking into account the intervening Veterans and Thanksgiving holidays, this afforded Dr. Avens a total of 17 business days to complete the work for essentially three lawsuits.

Likewise, BNSF retained John Kind, Ph.D., to critique and rebut Plaintiffs' anticipated industrial hygiene or toxicology experts. Like Dr. Avens, Dr. Kind began working in earnest to digest and evaluate reports of Dr. Hart, Dr. Marshall, Dr. Barry Castelman, Dr. Arthur Frank and Dr. Terry Spear immediately upon receipt. These five experts generated six reports constituting hundreds of pages, with references to hundreds of documents, articles and studies. BNSF assures this Court that Defendants' counsel diligently anticipated expert needs and that Dr. Kind and Dr. Avens worked diligently. The rebuttal reports prepared by Defendants' experts were provided to Plaintiffs as quickly as possible.²

² Defendants respectfully disagree that the number of attorneys devoted to this matter should be a consideration on this issue. (*See October 13, 2018 Order, at p. 2*). The attorneys cannot do this expert work. It can and should only be done by the experts. No number of lawyers could have expedited the rebuttal reports.

Defendants respectfully disagree that BNSF's request for additional time lacked merit because "[b]oth sides have disclosed numerous experts, and the Plaintiffs were able to comply with the rebuttal expert deadline," as was represented by Plaintiffs' counsel in their Response. Plaintiff's disclosed twenty expert reports; BNSF disclosed half that number. Equating both disclosures as "numerous" and therefore equivalent is not accurate. Furthermore, Plaintiffs did not timely disclose rebuttal expert reports. Rather, Plaintiffs filed a rebuttal disclosure on November 9, 2018 with BNSF removed from the certificate of service. *See Plaintiffs' Rebuttal Expert Disclosure*, attached hereto as **Exhibit E**. Plaintiffs did not serve this disclosure on BNSF electronically, by email, regular mail, or any other means when it was filed. Plaintiffs emailed BNSF a "courtesy copy" of their rebuttal disclosure on November 16, 2018, ironically the same day that BNSF served most of the rebuttal expert disclosures that Plaintiffs contend are untimely. *See Email correspondence dated November 16, 2018*, attached hereto as **Exhibit F**; *Defendants' Rebuttal Disclosure dated November 16, 2018*, attached hereto as **Exhibit G**. To the extent the Court were to find Defendants' rebuttal expert reports untimely, then the same finding should apply to Plaintiffs' experts.

Defendants were likewise diligent with respect to pursuing review of pathology. This Court took exception to the September timing of the request made for pathology for Plaintiff Barnes. The timeline of activities related to Barnes is:

April 17, 2018: Discovery propounded to Plaintiffs' including requests for signed medical releases

May 11, 2018: Signed medical authorizations received from Plaintiffs

May 17-30, 2018: Authorizations processed and communicated to numerous medical providers with requests for complete medical records.

June 26-August 22, 2018: Medical records periodically received from the various providers.

September 4, 2018: Medical release delivered to Glacier Pathology seeking pathology slides for analysis

October 11, 2018: Notice from Glacier Pathology regarding possession of S16-4727, Block A3.

October 23, 2018: 1st set of pathology slides received from Glacier

October 31, 2018: 2nd set of pathology slides received from Glacier

November 13, 2018: Expert report from Defendants' expert analysis of the pathology slides served on Plaintiffs

Pathology analysis is an expensive endeavor. As this timeline reflects, Defendants and their medical experts took eight (8) business days between receiving full records on August 22, and making the determination that the medical history and records warranted further pathological study and issuing the request to the pathology lab, Glacier. Defendants' retained pathologist then completed his analysis and issued his report within nine (9) business days of receipt of the pathology material from Glacier. Defendants dispute any suggestion that they lacked diligence.

Defendants admittedly did not anticipate that Plaintiffs would disclose an expert purporting to provide a fiber burden analysis of Plaintiff Flores' tissue, but for good reason. Defendants considered performing such an analysis in August 2018, and properly disclosed to Plaintiffs that they were contemplating having some pathology examined. In response, counsel for Plaintiffs, Jinnifer Mariman, asserted,

"In order to determine if we object to the destruction of any of our clients' tissues as part of any testing you intend to perform, we need to know what tissues you intend to test. ... Once we know what slices/slides you intend to test, we believe we can reach an agreement that would allow you to proceed with that testing provided that there is a meaningful portion remaining available tissue and provided that you inform us of the type of testing you intend to perform on our clients' tissues."

*See email dated August 8, 2018, attached hereto as **Exhibit H**.* Counsel for BNSF respected this

position as proper, which is why we initiated the communication in the first place. BNSF ultimately elected to have non-destructive pathology slides examined. Yet, despite asserting that destructive testing should not be done without conferring with the opposing party to arrive at an agreement on the testing and tissue to be destroyed, Ms. Mariman one month earlier had done exactly that. Investigation following Plaintiff's October 26 expert disclosure revealed that, on July 3, 2018, Ms. Mariman instructed the CARD clinic to deliver tissue to a pathology lab in New York. *See CARD Clinic record* attached hereto as **Exhibit I**. Ms. Mariman then instructed her retained expert to proceed with destructive testing on the tissue on August 13, 2018, five (5) days after insisting such should not be done without notice to the other party. *See Report of Ron Dodson, p. 1*, attached hereto as **Exhibit J**.

Defendants received no notice from Plaintiffs of this planned testing. Defendants would have insisted upon an allowance for both parties to test the material had it been given the opportunity to do so. The concealment of this destructive testing was aided by the CARD Clinic, which withheld the above-referenced record reflecting the tissue had been released to Plaintiffs from medical records produced pursuant to medical release. All of the subject tissue from this block was removed from its paraffin container by Plaintiffs' experts and much it was dissolved as a part of this testing. After inquiry, Plaintiffs' counsel informed Defendants that some remaining tissue in formaldehyde was returned to the CARD Clinic only days ago. Defendants are attempting to determine whether this remaining tissue has any pathological value and make seek further relief.

2. Plaintiffs have suffered no prejudice from the short delay in completing rebuttal reports.

Defendants produced to Plaintiffs the last of their rebuttal reports (with the exception of potential pathology review in Flores) on November 26, 2018, the date requested in Defendants'

Motion. In its filing of November 29, 2018, Plaintiffs sought to vilify this disclosure. Contrary to those accusations, BNSF was not flouting this Court's authority. Rather, understanding that this Court approved additional briefing on these Motions, BNSF simultaneously continued completing the disclosures in earnest and providing them to Plaintiffs as quickly as possible. Plaintiffs have now received all expert disclosures, and there is no prejudice from the timing. This is shown by: (a) Defendants' final rebuttal disclosures were served only four (4) business days (November 26) after Plaintiffs served their rebuttal disclosures (November 16); (b) The disclosures were served nearly four (4) months prior to trial; (c) The disclosures were served on the same day of the State of Montana's extended deadline for disclosing primary experts in this case, and three weeks before the State of Montana's rebuttal expert witness reports were due; (d) Expert discovery has not been completed. Only three (3) expert depositions have been completed to date. Expert depositions are scheduled in December and January to accommodate the schedules of the witnesses; and (e) Plaintiffs' have deposed none of Defendants' experts to date, so they have every opportunity to fully flesh out the opinions disclosed in the rebuttal reports.

3. Defendants request only a small increase in the number of available depositions.

BNSF agrees with the Court that this case has been litigated at times by obfuscation. The status of witness discovery is the primary abuse. The Court is well aware that Plaintiffs have identified over 70 witnesses. Plaintiffs disclosed five new fact witnesses and 11 expert witnesses after this Court issued its ruling following the informal discovery conference limiting the parties to 20 depositions. In its filing of November 29, 2018, counsel for Plaintiffs' represented to this Court that it had actually "in good faith" narrowed its list of witnesses to a select, smaller group. In actuality, that supplemental discovery response lists forty witnesses by name, and then states that Plaintiffs may also call "any party identified in discovery." *See Plaintiff Tracey Barnes First*

Supplemental Response to Master Discovery, Response to Interrogatory No. 8, attached hereto as **Exhibit K**. Counsel for Plaintiffs cannot reasonably expect anywhere close to this number of witnesses, but they have to date effectively gamed the process by disclosing numerous witnesses, fighting to keep the number of depositions low, asserting an attorney-client relationship with numerous witnesses,³ and hiding the ball as to who they really intend to call at trial. BNSF requests that the Court not allow such gamesmanship and either grant leave to take additional depositions or limit the Plaintiffs to calling only those witnesses that were deposed in this case.⁴

In this Motion, Defendants have identified the specific witnesses it wishes to depose, each of which was specifically identified as an important witness. Defendants don't seek to depose 70 witnesses, but rather a fraction of those. The request is reasonable, does not impose an undue burden on Plaintiffs, and will not delay the trials of this matter.

Knight Nicaastro, LLC

Respectfully submitted,

/s/ Chad M. Knight

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³ Plaintiff's assertion that Defendants should just talk to these witnesses in counsel's presence is unreasonable. These witnesses are plaintiffs, clearly adverse to BNSF and clearly aligned with their lawyers. A deposition is the means by which such an adverse witness can be questioned under oath.

⁴ Defendants respectfully disagree with the analysis in the Court's November 14, 2018 Order that Rule 30, Mont.R.Civ.P. does not contemplate 10 depositions per party. In the scenario described by the Court of the 217 plaintiff case filed in Cascade County Cause No. DDV-16-0786, were the defendant limited to 10 depositions, it would not be in position to even depose all of the plaintiffs. Defendants contend that this is not the result contemplated by Rule 30. Rather, the Rule states that the Court "must" grant leave consistent with Rule 26. Plaintiffs, who are the masters of their complaints, should not be allowed to limit a defendant's right to full discovery by deciding to join together in a lawsuit. *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.").

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 and by U.S. Mail on this 30th day of November, 2018:

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