IN THE SUPREME COURT OF THE STATE OF MONTANA
No. _____

BNSF RAILWAY COMPANY, NANCY AHERN, JOHN DOES 1-10,

PETITIONERS,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY and THE HONORABLE KATHERINE BIDEGARAY, PRESIDING JUDGE,

RESPONDENTS.

PETITION FOR WRIT OF SUPERVISORY CONTROL AND FOR AN ORDER STAYING FURTHER PROCEEDINGS

On Petition from the Eighth Judicial District Court, Cascade County, Montana
Cause No. BDV-14-001
Honorable Katherine Bidegaray

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I. INTRODUCTION

Petitioners BNSF Railway Company ("BNSF") and Nancy Ahern ("Ahern") ("Petitioners") petition the Court under Montana Rules of Appellate Procedure 14(3) for a Writ of Supervisory Control, and 14(7)(c) for a stay to prevent irreparable harm resulting from the District Court's erroneous ruling directing the default of both Petitioners and requiring BNSF to disclose attorney-client privileged materials.

In its November 16, 2018 Corrected Order on Sanctions, the District Court entered default against both BNSF and Ahern based on discovery abuses alleged only against BNSF. App. A: Corrected Order Sanctions, November 16, 2018 ("Sanctions Order"). The District Court also ordered, as an additional sanction, the production of internal status reports on all FELA actions pending in the United States from 2010 to present, including actions which are currently in active litigation. Production of these reports will result in significant disclosure of privileged attorney-client communications and attorney work-product materials.

The District Court's ruling robs Ahern of her right to a jury trial on liability and causation. Yet the Sanctions Order is devoid of any factual findings of discovery abuse or any other misconduct by Ahern that would support sanctions against her.

Similarly, the Sanctions Order inappropriately defaulted BNSF for allegedly failing to comply with the Court's February 22, 2018 Order on Plaintiff's Motion to Compel ("Compel Order"), when the evidence presented to the District Court established that BNSF in fact produced the ordered discovery. App. B: Order Pl.'s Mot. Compel, Feb. 22, 2018. The Sanctions Order punishes BNSF for conduct not at issue in the Compel Order, thus failing to provide sufficient notice to BNSF of alleged discovery deficiencies. Because the Sanctions Order has caused a gross injustice to BNSF and Ahern, supervisory control is justified.

Finally, this Court should set aside the Sanctions Order because the claims raised here are preempted by the Federal Employers Liability Act ("FELA"). 45 U.S.C. § 51 et seq. Although Petitioners are cognizant of this Court's prior ruling that an appeal would be adequate to determine preemption, the District Court's recent default of the Petitioners robs them of their right to a jury trial, which is guaranteed under FELA. The statutory and common law claims raised here intrude on FELA's comprehensive scheme, conflict with Congress's goal of nationwide uniformity, and undermine a FELA defendant's ability to defend itself on the merits. Because Dannels' underlying claims are preempted, the District Court lacked authority to enter the Sanctions Order.

II. OVERVIEW AND FACTS SUPPORTING JURISDICTION

Dannels alleges BNSF and Ahern violated Montana's Unfair Trade Practices

Act ("UTPA") in handling Dannels' FELA claim. App. C: Compl. Jury Demand, Jan. 2, 2014.

Dannels filed a Motion to Compel, Motion for Sanctions, and Brief in Support. The Motion to Compel sought production of: 1) all privileged documents and communications concerning Dannels' claims; 2) past "monthly summaries" of litigation results prepared by in-house counsel concerning then-pending litigation; 3) non-disparagement clauses in the separation agreements of several former BNSF claims personnel; and 4) confidential materials concerning setting reserves that BNSF had identified and offered to produce subject to a protective order. App. D: Pl.'s Mot. Compel, Mot. Sanctions Br. Support, Jan. 18, 2018.

On February 22, 2018, the court issued its Compel Order, requiring BNSF to produce "all documents" relating to the handling, evaluation and settlement of Dannels' underlying claim; to specify documents or redactions on a privilege log; to highlight portions of documents for which Petitioners assert attorney-client privilege; to produce "monthly summary" reports of Charles Shewmake and his predecessors for twenty years; to produce, subject to a protective order, any "technical manual" related to "FELA accounting," "any study or review of BNSF's claims handling practices or procedures and/or amounts paid out on FELA claims" by any "consulting company" since 2007, and documents showing methods and

criteria used for reserving or accruing losses related to FELA claims since 2007. The Compel Order also required BNSF to produce a witness who would testify at trial about punitive damages.

Defendants responded to the Compel Order in a series of Notices of Compliance and discovery supplementation. Defendants also filed a Motion for Protective Order concerning the temporal scope of the order to produce the "monthly summaries," arguing that the production should only extend to the date Dannels filed the instant UTPA action.

During an April 2018 hearing, BNSF offered witness testimony to show that any inadequacies in document production was neither willful nor in bad faith. Felicia Williams, General Director of Accounting for BNSF, testified regarding reserves. She explained that BNSF does not maintain cash or cash equivalents in investment accounts. App. E: Hr'g Tr. 22-28, Apr. 18, 2018. The issue of money being set aside for reserves and earning investment income was never the subject of a discovery request by Dannels, but was instead a theory articulated by Dannels' expert in his deposition, which was taken 10 days after Dannels filed his motion to compel. App. F: Dep. Jon Moyers 156:4-24, Jan. 31, 2018.

At the hearing, BNSF established it does not invest its reserves in outside corporations or entities. App. E: 22-28. Dannels' theory on investment, which the Court adopted, is based on the consolidated financial statements of two other

companies, Burlington Northern Santa Fe LLC and Burlington Northern Santa Fe Insurance Company, Ltd. App. A: 14. BNSF is a wholly owned subsidiary of Burlington Northern Santa Fe LLC ("BNSF LLC"). Burlington Northern Santa Fe Insurance Company, Ltd. ("BNSF IC"), which was once a defendant in this case but was dismissed, is also a wholly owned subsidiary of BNSF LLC. Berkshire Hathaway is the parent company of BNSF LLC. App. G: Aff. Kevin J. Burrin, Oct. 3, 2014 (CR 33); Ex. 698-7. None of those other companies is a party to this case or subject to the orders issued by the District Court.

Dannels also complained BNSF had not produced monthly status reports of FELA cases which report outcomes, settlements, verdicts, reserves, and evaluations. App. D: 1. However, the Court never ordered BNSF to produce these monthly status reports prior to the Sanctions Order. Dannels never requested ALL monthly status reports, just FELA claim summaries prepared by Charles Shewmake, a former BNSF attorney, who testified he only reported results of cases, not settlements. BNSF has produced the monthly summaries of Shewmake and Eric Hegi.

The Sanctions Order is an almost verbatim adoption of Dannels' proposed order. App. H: [Dannels' Proposed] Order on Sanctions, May 4, 2018. By relying on Dannels' proposed order, the District Court abdicated its fact-finding role and in fact adopted several mistakes of fact as described above. First, it finds fault in

BNSF not producing information for other entities which are not parties to this case, such as BNSF LLC and BNSF IC. Second, it criticizes BNSF for failing to produce documents which had not been requested in discovery and which it had not been compelled to produce. Finally, it finds that monthly reports containing attorney-client and work product information, including cases which are currently being litigated both in Montana and elsewhere, are discoverable and not subject to protection and redaction.

III. STATEMENT OF ISSUES

A. Whether the District Court erred by granting a default against Ahern and BNSF?

B. Whether the District Court erred by finding that not producing documents from non-parties can be the basis for sanctions?

C. Whether the District Court erred by compelling production of documents containing attorney-client communications in ongoing litigation?

D. Whether Dannels' claims are preempted by FELA?

IV. ARGUMENT AND AUTHORITIES

A. This Court has legal authority to grant the Writ.

The Montana Constitution gives the Supreme Court power to assume control of a trial court and direct the course of litigation. Mont. Const. art. VII, § 2(2); Mont.R.App.P. 14(1), (3). Pursuant to Rule 14(3):

> Supervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:
>
> (a) The other court is proceeding under a mistake of law and is causing a gross injustice . . . .

Mont.R.App.P. 14(3)(a).

Although a writ of supervisory control is an extraordinary remedy, the Supreme Court has wide latitude to intervene and control the course of litigation. *Plumb v. 4th Jud. Dist. Ct.*, 279 Mont. 363, 369, 927 P.2d 1011, 1015 (1996), *superseded on other grounds*. When the exigency of the case "renders the ordinary remedy of appeal inadequate, the summary appeal by writ of supervisory control is available." *State ex rel. Tillman v. Dist. Ct.*, 101 Mont. 176, 180, 53 P.2d 107, 109 (1936) (citation omitted). A writ is particularly warranted where, as here, decisions of the District Court prejudice the entire proceedings and place a party at significant disadvantage in making or defending its case. *Preston v. Mont. 18th Jud. Dist. Ct.*, 282 Mont. 200, 206, 936 P.2d 814, 817-18 (1997).

This Court recently accepted supervisory jurisdiction where a sanction "precluded a determination on the genuinely-disputed merits of the pivotal issue." In *Montana State University-Bozeman v. Mont. 1st Jud. Dist. Ct.*, 2018 MT 220, ¶¶ 16-18, 392 Mont. 458, 426 P.3d 541, the Court reasoned that, if the District Court abused its discretion in issuing a default judgment on liability as a sanction

(for spoliation of evidence and discovery abuses), "failure to exercise supervisory control will unnecessarily delay correction of the error at undue cost to both parties by appeal and remand for a new trial *in toto*."

B. The District Court erred when it granted a default judgment against Ahern and BNSF.

Although District Courts have broad discretion to impose discovery sanctions under Mont.R.Civ.P. 37(b-f), that discretion is not unfettered. *MSU*, ¶ 15 (citations omitted). This Court reviews sanctions orders for abuse of discretion, which occurs when a ruling "is based on a mistake of law, clearly erroneous finding of fact, or arbitrary reasoning, lacking conscientious judgment or exceeding the bounds of reason, resulting in substantial injustice." *MSU*, ¶ 15 (citation omitted). Review of a discretionary decision "is a question of law subject to de novo review." *MSU*, ¶ 15 (citation omitted). Findings of fact are reviewed for clear error. *MSU*, ¶ 20.

When determining whether a discovery sanction is an abuse of discretion, the Supreme Court will examine whether a discovery violation or abuse occurred, the extent of the prejudice caused by the violation or abuse, and whether the sanction is proportional to the nature and effect of the violation or abuse. *MSU*, ¶ 20 (citation omitted). In addition, if it is alleged that the discovery abuse or violation was after a specific warning by the District Court, the reviewing court

will examine if the sanction is consistent with the warning. *Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co, Inc.*, 2005 MT 254, ¶ 15, 329 Mont. 38, 122 P.3d 431. Entering default is an appropriate sanction only when there is a blatant and systemic abuse of the discovery process or a pattern of willful and bad faith conduct. *Spotted Horse v. BNSF Ry. Co*., 2015 MT 148, ¶ 20, 379 Mont. 314, 350 P.3d 52 (citations omitted).

The District Court abused its discretion by defaulting Ahern. In its Sanctions Order, the District Court stated that it "warned BNSF about its discovery obligations and the potential for sanctions for noncompliance" and that BNSF "failed to comply with this Court's discovery orders." Sanctions Order 33. It then sanctioned BNSF by entering a default judgment on liability and causation against BNSF. The District Court further stated that the case shall go to trial "*solely* on the measure of damages Dannels is entitled to recover on his bad faith claims, and whether he should recover punitive damages against Defendants and, if so, the amount." Sanctions Order 34 (emphasis added). By the Sanctions Order's express terms, adopted verbatim from Dannels' proposed order, there will be *no* trial as to Ahern on liability or causation. But there is no mention of any alleged discovery abuse by Ahern, nor is there any basis in the record for any sanction whatsoever against her. The District Court clearly erred when it adopted Dannels' Order granting a default against Ahern.

The District Court abused its discretion by defaulting BNSF. There has been no systemic, bad faith abuse of the discovery process by BNSF in this case. To the contrary, BNSF produced the items required by the Compel Order (documents relating to Dannels' actual claim (with a privilege log), monthly summaries of Charles Shewmake and predecessors for 20 years (even though Dannels only requested 15 years), documents related to claim handling procedures and reserving or accruing losses related to FELA claims), as its witnesses at the April 2018 hearing testified. Per the Court's Compel Order, BNSF appropriately redacted and logged privileged information, and produced documents to Dannels.

The order written by Dannels and adopted by the District Court faults BNSF for numerous things, almost none of which were even the subject of Dannels' Motion to Compel. For example, Dannels never compelled production of information relating to investment of reserve amounts. When that information was brought before the Court, BNSF produced Felicia Williams to testify about it. She testified that BNSF does not in fact invest reserves in outside investment entities. The District Court faults BNSF for not having someone to testify differently, but that essentially punishes BNSF for not producing what it does not have. Moreover, because this information was not addressed in the Motion to Compel, BNSF had no warning prior to the Sanctions Order regarding this issue.

The District Court erred when it granted the ultimate sanction against BNSF, as it relied on erroneous facts and conclusions, and there was no evidence of abuse "so inexcusable and prejudicial that it outweighs the express preference in Mont.R.Civ.P. 1 for adjudication on the merits." *MSU*, ¶ 21 (citation omitted). Because there was no evidence of discovery abuse by Ahern, and no evidence of inexcusable, prejudicial and bad faith conduct by BNSF, this Court should reverse the District Court's entry of default judgment.

C. The District Court erred when it relied on a failure to produce documents and information from non-parties as a basis for sanctions.

In the Sanctions Order, the District Court discussed at length the financial information of BNSF LLC and BNSF IC in relation to the production of reserving information as well as Paragraph 6 of the Compel Order, which required the production of a witness to testify at trial about punitive damages issues if such liability was found. Notably, the District Court faulted BNSF for not producing a witness who was able to testify about the financial statements and reserves of those two companies, who are undisputedly not parties in this case and whose assets are not at issue in this case.

The Sanctions Order devotes approximately 7 pages to discussing the other companies, and specifically notes that ". . . the Court has considered the interrelationship of Burlington Northern Santa Fe, LLC, and its subsidiaries, BNSF

Railway Company (BNSF), and Burlington Northern Santa Fe Insurance Company Ltd. (BNSF IC) as described in the Affidavit of Dennis Connor Detailing Deficiencies with Defendants' Compelled Discovery." The Court further stated "**Given their relationships, BNSF must have within its possession, custody or control the documents discussed and further ordered to be produced within this Order.**" Sanctions Order 14-15.

The financial statements and testimony thereon that Dannels and the District Court take issue with are not those of BNSF, but are for BNSF LLC and BNSF IC, two non-parties. The reserves discussed at length in the order are reserves for BNSF LLC, not BNSF. Sanctions Order 14-17. The District Court's arbitrary reliance on information for non-party corporate entities, its erroneous conclusion that such information pertains to, and is in the possession of BNSF, and its willingness to base an award of sanctions on BNSF's inability to produce non-party information, results in substantial injustice to BNSF. Accordingly, the Court should set aside these findings.

D. The District Court erred when it held that, as an additional sanction, BNSF should be required to produce attorney-client privilege and work product information.

Perhaps most egregiously, in its Sanctions Order, the District Court ordered BNSF to produce "[a]ll monthly status reports on FELA claims, as identified in the deposition of Dione Williams, from 2010 to date." Sanctions Order 35. The Court

specifically carved out this production "as an additional sanction," not as a previously requested set of documents that BNSF had somehow inappropriately refused to produce. In other words, this production is not directly related to a Request for Production or Dannels' Motion to Compel; it is simply a set of documents Dannels wanted and then inserted into his proposed Order, which was adopted wholesale by the District Court.

In Montana, documents that are necessary for legal advice or advocacy in a judicial proceeding are not admissible, unless the party has asserted advice of counsel as a defense. *See Nelson v. City of Billings*, 2018 MT 36, ¶ 23, 390 Mont. 290, 412 P.3d 1058; *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 109, 861 P.2d 895, 906 (1993) (citation omitted) ("attorney-client privilege protects Farmers from disclosing those reports ["'confidential reports' concerning the pending litigation"] and any other correspondence sent in the course of the professional relationship with its attorneys.").

The monthly status reports contain reserve information derived from attorney-client privileged information. Because the Sanctions Order is from 2010 to date, production of these documents will necessarily include reports for cases currently in litigation, both in Montana and in other states, and thus will result in the disclosure of attorney work product and privileged communications that can be used against BNSF in ongoing FELA cases.

The District Court certainly never warned BNSF that as a sanction for a perceived discovery abuse, it would be required to waive, nationwide, its attorney-client privilege and the protection of the work-product doctrine for all of its ongoing FELA cases. Such a sanction exceeds the bounds of reason and flies in the face of the policy protecting attorney-client information to encourage the best possible legal advice by establishing open and forthright communication between the attorney and the client. It is also not listed under Rule 37(b)(2)(A)(i-vii) as a possible sanction for disobeying a discovery order and as such is not authorized by the Montana Rules of Civil Procedure.

The District Court's sanction of compelling attorney-client privileged and work product information is based on a mistake of law, lacks conscientious judgment, and far exceeds the bounds of reason. The District Court erred when it sanctioned BNSF, without prior warning, to produce the monthly reports to date.

E. The District Court erred in holding that Dannels' claims are not preempted by FELA.

Finally, even if the Court's reasoning and conclusions were otherwise correct, the entire Sanctions Order is void because the underlying claims are preempted by FELA. While this Court has held otherwise in *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, 312 Mont. 498, 60 P.3d 418, and declined to reconsider this ruling on a previous petition for a writ of supervisory

control, those rulings conflict with binding U.S. Supreme Court precedent and should be overturned, especially as the District Court's ruling on default has eliminated Petitioners' right to a jury trial.

First, Dannels' bad faith claims are field preempted. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citation omitted) (state law preempted when 'the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"). FELA is *comprehensive* as to railroad employers' liability to their employees for injuries incurred while engaged in interstate commerce. *See, e.g.*, *S.B.R. Co. v. Ahern*, 344 U.S. 367, 371 (1953); *Chi. M. & St. P. Ry. Co. v. Coogan*, 271 U.S. 472, 474 (1926).

Dannels' bad faith claims exist only as a result of BNSF's treatment of his underlying FELA claim. In other words, BNSF's liability under Montana law arises entirely out of its employment relationship with Dannels and out of Dannels' underlying FELA claim. The distinction between damages arising out of Dannels' physical injury and out of the emotional injury allegedly suffered as a result of BNSF's and Ahern's treatment of Dannels' claim is immaterial—the availability or unavailability of damages under FELA arising out of a specific injury does not inform whether FELA is the exclusive remedy for that injury. *See, e.g.*, *Jess v. Great N. R. Co.*, 401 F.2d 535 (9th Cir. 1968).

Second, Dannels' bad faith claims are conflict preempted. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (citation omitted) (state law preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). One of FELA's central purposes "was to create uniformity throughout the Union with respect to railroads' financial responsibility to their employees." *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, n.5 (1980).

Montana's bad faith laws undermine uniformity and interfere with FELA's "purposes and objectives." They restrict the defenses an employer may raise to a FELA lawsuit; in every state except Montana, a FELA defendant is entitled to defend against a FELA claim on the merits and take the case to a jury verdict. But liability under Montana's bad faith laws can be premised solely on the fact that an employer elected to defend itself against a FELA claim rather than pay the full amount demanded by the employee. Montana's bad faith laws also undermine FELA's damages scheme. "Questions concerning the measure of damages in an FELA action are federal in character," *Liepelt*, 444 U.S. at 492-93, yet Dannels is being permitted through this suit to seek damages arising out of his injury not provided for under FELA. There is also a threat of double recovery if an employee succeeds in obtaining emotional damages in both a FELA suit and a bad faith suit. Finally, Montana's bad faith laws undermine FELA's allowance for settlement, which has been expressly recognized by the U.S. Supreme Court. *See Callen v.*

Pa. R. Co., 332 U.S. 625, 631 (1948). Montana's laws drive FELA defendants to two extremes—either pay the full amount demanded, or risk being subject to a UTPA claim simply for exercising its rights under FELA.

The issue of preemption—and this Court's prior ruling in *Reidelbach*—is ripe for reconsideration and review now. As set forth above, BNSF has been ordered to disclose privileged materials entirely unrelated to the issues in this case. Aside from the fact the Sanctions Order arises out of a lawsuit that should never have been brought in the first place, the order itself infringes on BNSF's ability to defend itself in FELA cases nationwide, thus heightening the contradiction between Montana's bad-faith laws and FELA's uniform regime. The time to correct that mistake is now, before BNSF suffers further irreparable injury.

V. CONCLUSION

Petitioners respectfully request the Court set aside the defaults granted against Ahern and BNSF, set aside the Sanctions Order, or alternatively, set aside that portion of the Sanctions Order based on non-party information, and set aside that portion of the Sanctions Order which requires BNSF to produce attorney-client privileged materials.

Pursuant to Montana Rule of Appellate 14(7)(c), Petitioners BNSF Railway Company and Nancy Ahern respectfully move the Court for a stay of the District

Court proceedings while Petitioners' Petition for Writ of Supervisory Control is pending before this Court.

DATED this 11th day of December, 2018.

/s/ Robert J. Phillips
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2010 is 3898 words, excluding Certificate of Service and Certificate of Compliance.

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CERTIFICATE OF SERVICE

I, Robert J. Phillips, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ - Supervisory Control to the following on 12-11-2018:

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