

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 18-0693

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

Petitioners,

v.

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

**DANNELS' RESPONSE TO PETITION FOR WRIT
OF SUPERVISORY CONTROL**

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

Attorneys for Plaintiff Robert Dannels

Dennis P. Conner/Keith D. Marr

Conner & Marr, PLLP

P. O. Box 3028

Great Falls, MT 59403-3028

Telephone: (406) 727-3550

dennis@connermarr.comkeith@connermarr.com

Erik B. Thueson

Thueson Law Office

P. O. Box 280

Helena, MT 59624-0280

Telephone: (406) 449-8200

ethueson@gmail.comAttorneys for Petitioners

Robert J. Phillips

Garlington, Lohn & Robinson, PLLP

P. O. Box 7909

Missoula, MT 59807-7909

Telephone: (406) 523-2500

rjphillips@garlington.com

Jeff Hedger

Hedger Friend, PLLC

2800 Central Avenue, Suite C

Billings, MT 59102

Telephone: (406) 896-4100

jhedger@hedgerlaw.com

TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION	1
II. SUMMARY OF ARGUMENT.....	1
III. FACTUAL BACKGROUND.....	5
IV. ARGUMENT.....	13
A. Supervisory Control is Inappropriate	13
B. Default Judgment Against BNSF.....	13
C. Documents Purportedly from Non-Parties.....	15
D. Purported Attorney-Client and Work Product Information	16
V. CONCLUSION.....	18
CERTIFICATE OF COMPLIANCE	19
CERTIFICATE OF SERVICE.....	20

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Anderson, et al. v. Montana First Judicial District Court,</i> Montana Supreme Court Cause No. 09-0176 (May 27, 2009)	18
<i>Kuiper v. District Court of Eighth Jud. Dist.,</i> 193 Mont. 452, 632 P.2d 694 (1981).....	5, 16
<i>Montana State University v. Montana First Jud. Dist. Court,</i> 2018 MT 220, 392 Mont. 458, 426 P.3d 541	13
<i>Reidelbach v. Burlington N. & Santa Fe Ry. Co.,</i> 2002 MT 289, 312 Mont. 498, 60 P.3d 418	1-2
<i>Richardson v. State,</i> 2006 MT 43, 331 Mont. 231, 130 P.3d 634	14
<i>Spotted Horse v. BNSF R.R. Co.,</i> 2015 MT 148, 379 Mont. 314, 350 P.3d 52	2
<i>Strom v. American Honda Motor Co., Inc.,</i> 667 N.E.2d 1137 (Mass. 1996).....	4
<i>Uniden America Corp. v. Ericsson Inc.,</i> 181 F.R.D. 302, 306 (M.D. N.C. 1998);	4
 Statutes	
Section 33-18-201, MCA, <i>et seq.</i>	5
 Other Authorities	
Wright and Miller, 8B Fed. Prac. & Proc. Civ. § 2210 (3d ed.).....	4
 Rules	
M.R.Civ.P. 34	3-4
M.R.Civ.P. 37	13

I. INTRODUCTION

Petitioners BNSF Railway Company (“BNSF”) and Nancy Ahern petition this Court for an extraordinary writ exercising supervisory control over the trial court.

BNSF claims the trial court is proceeding under a mistake of law and causing a gross injustice because:

1. Dannels’ claims are preempted by FELA;
2. The trial court erred by granting a default against Ahern and BNSF;
3. Failing to produce documents from non-parties cannot justify sanctions; and
4. The trial court erred by compelling production of documents containing attorney-client communications in ongoing litigation.

BNSF’s Statement of Issues at page 6 of its Petition.

BNSF’s claims are groundless and do not satisfy the supervisory control threshold.

II. SUMMARY OF ARGUMENT

This case arises out of the handling a FELA claim brought by Robert Dannels against BNSF. Following a favorable FELA verdict, Dannels filed the present bad faith and punitive damage case on January 2, 2014.

In an odd second attempt before this Court, BNSF again claims the trial court is mistakenly following this Court’s precedent in *Reidelbach v. Burlington N. &*

Santa Fe Ry. Co., 2002 MT 289, 312 Mont. 498, 60 P.3d 418. This Court rejected that argument in BNSF's first petition for supervisory control, concluding:

As Dannels aptly notes in his response to BNSF's petition, "By definition, it is not a 'mistake of law' for a District Court to abide by binding precedence [sic]." More to the point, if BNSF wants this Court to revisit our opinion in *Reidelbach*, the normal appeal process is certainly adequate for that purpose.

See this Court's February 20, 2018, Order, Dannels' App. 1, p. 3.

There will be no unfair prejudice to Petitioner Nancy Ahern. The trial court granted Dannels' motion for sanctions against BNSF and entered a default judgment on liability and causation against it. Corrected Order on Sanctions, Exhibit A to Petitioner's Appendix, p. 34. Dannels will move to dismiss all claims against Ahern with prejudice, rendering the alleged error against her moot.

Default sanctions against BNSF were overdue and merited. BNSF is a "sophisticated and recurrent party to litigation" which knows its evidentiary obligations. *Spotted Horse v. BNSF R.R. Co.*, 2015 MT 148, ¶ 22, 379 Mont. 314, 350 P.3d 52. Despite repeated court orders and warnings, BNSF refused to identify or produce discoverable information. As the trial court makes crystal clear:

[T]his case has vanquished in the discovery phase for years, in large part due to BNSF's recalcitrance.

....

[T]he pattern which has emerged in this case is a legitimate discovery request, followed by evasive non-responses, a motion to compel, an order to compel, qualified and incomplete responses from

BNSF following the order to compel, deposition testimony and/or evidence contradicting BNSF's written discovery responses, more discovery meetings, a second motion to compel, more incomplete responses from BNSF, and, ultimately, hollow explanations for the noncompliance which purport to cast blame in all directions but Fort Worth.

Corrected Order on Sanctions, pp. 30-31.

On March 27, 2018, Dannels filed the Affidavit of his attorney Dennis Conner Detailing Deficiencies with Defendants' Compelled Discovery. See App. 2. This affidavit chronicles BNSF's egregious litigation conduct and the trial court's painstaking patience and reasoned judgment in dealing with BNSF's discovery antics. The trial court considered the discovery at stake, ordered its production, entered an early sanction of attorney fees and warned of noncompliance. After years of discovery abuse, the trial court entered default sanctions supported by detailed findings.

BNSF complains about producing information possessed by Burlington Northern Santa Fe, LLC ("BNSF LLC") and Burlington Northern Santa Fe Insurance Company, Ltd. ("BNSF IC"). It suggests ordering production of this "non-party" information somehow prejudices BNSF.

Rule 34, M.R.Civ.P., contemplates the production of documents within the responding party's possession, custody, or control. Many courts have examined this within the parent, subsidiary, sister corporation context and held that documents possessed by a non-party, affiliated company fall within the ambit of possession,

custody, or control under Rule 34. Wright and Miller, 8B Fed. Prac. & Proc. Civ. § 2210 (3d ed.). When the facts demonstrate an intermingling of the entities, courts often require subsidiary companies to respond to a Rule 34 request which implicates parent or sister companies' documents. See *Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D. N.C. 1998); *Strom v. American Honda Motor Co., Inc.*, 667 N.E.2d 1137 (Mass. 1996).

The trial court considered the interrelationship of BNSF and its parent and sister companies. See Corrected Order on Sanctions, pp. 16-17. Given the intermingling and sharing of company information, the trial court, in its discretion, correctly ordered BNSF to produce information BNSF claims to be in the possession of BNSF LLC and BNSF IC. The trial court's discretionary ruling is consistent with Rule 34 and the authorities cited above interpreting its reach.

BNSF's argument that the trial court erred by compelling production of documents containing attorney-client communications in ongoing litigation is premised on two fundamental fallacies. First, BNSF suggests Dannels did not request the Williams reports/information in discovery. Second, BNSF suggests the trial court's ruling results in a nationwide waiver of privilege. This over dramatization bears no relationship to the trial court's analysis.

On the first issue, Dannels sought reports about claims made by injured BNSF workers from this case's inception. The second issue, privilege waiver, is not the

cataclysmic event BNSF suggests. BNSF unilaterally claims the monthly summaries and Williams reports contain privileged information. As noted in App. 2, ¶ 71, “Dannels only expects production of results obtained in FELA cases that are **closed**, like the closed claim file reports in *Kuiper*.” (Emphasis supplied). In *Kuiper v. District Court of Eighth Jud. Dist.*, 193 Mont. 452, 632 P.2d 694 (1981), this Court dealt with reports that “analyzed **closed** product liability files and reported . . . the results obtained in each of those files” and held the attorney-client and work product privilege did not apply to such reports. *Kuiper*, 193 Mont. at 461-62, 632 P.2d at 699-701. The trial court never compelled the production of documents protected by privilege.

III. FACTUAL BACKGROUND

Dannels alleges that in handling his underlying FELA claim, BNSF violated Montana’s Unfair Trade Practices Act (§ 33-18-201, MCA, *et seq.*) and common law. Dannels claims BNSF acted with malice and fraud and that punitive damages should be assessed because of BNSF’s systematic scheme to:

- (a) Cause delays and make litigation expensive to emotionally and financially affect injured employees to a point where they settle for less than a fair amount;
- (b) Avoid fair and equitable settlement of FELA claims;
- (c) Drive out competent legal representation for injured employees by making claims too stressful and time-consuming for attorneys to represent injured railroad employees; and

- (d) Maximize profits by investing FELA injury claim reserves and premiums as long as possible to achieve the greatest return on those.

Corrected Order on Sanctions, p. 3.

In searching for the discoverable information to support his claims, Dannels served written discovery on the Defendants in August 2014. Dannels sought training and educational information regarding BNSF's claims handling practices, information about the FELA claim investigation and handling, the relationship between BNSF and its insurance company, and Dannels' underlying FELA claim file. In Interrogatory No. 5, Dannels asked whether "BNSF generate[s] any types of reports containing information about claims made by injured BNSF workers and the outcome of their claims." Dannels asked BNSF to identify and produce each such report utilized over the past 15 years (Interrogatory No. 5 and Request for Production No. 7). Corrected Order on Sanctions, pp. 3-4. When BNSF finally responded to Dannels' discovery requests, it objected to nearly every one and provided no meaningful information. Dannels then filed his first motion to compel discovery. Corrected Order on Sanctions, pp. 3-4.

The trial court ruled on Dannels' first motion to compel on January 26, 2017. See trial court's January 26, 2017, Order, Dannels App. 3. The court found most of BNSF's objections baseless. Regarding privilege objections, the trial court granted in part Dannels' Motion to Compel and ruled:

All of BNSF's work product, including opinion work product by its personnel, shall be produced in accordance with *Barnard*. Only opinion work product of BNSF's attorneys "as distinguished from that of the insurer's representatives" remains protected.

January 26, 2017, Order, App. 3, page 8.

The trial court overruled BNSF's boilerplate objections and ordered it to meaningfully respond to Dannels' discovery requests. BNSF was specifically ordered to answer Interrogatory No. 5. It warned the parties to effectively participate in and complete all specified pretrial activities in good faith, or face potential sanctions. Corrected Order on Sanctions, p. 5.

By this point, the trial court was forced to vacate two prior scheduling orders and trial dates. The court found "that a substantial factor for the delay has been the defendants' conduct." The court noted many of Defendants' objections were not justified and "the defendants have not responded in good faith at least contributing to the long delay." The court warned that if BNSF "choose[s] to disobey these discovery orders or evade further discovery, harsh sanctions authorized by Rule 37(b)(2) shall be imposed." Corrected Order on Sanctions, pp. 4-5.

BNSF served supplemental discovery responses to Dannels' first written discovery on February 27, 2017. BNSF supplemented its answer to Interrogatory No. 5:

BNSF Claims Department currently runs thousands of reports each year. While some of these reports are run on a set schedule and retained in a central location, with set distribution lists, numerous

Claims Department employees are able to run reports on their own and thousands of potentially responsive ad hoc reports are run each year. Providing the information requested would require an inquiry to all Claims Department employees with the ability to run reports in order to gather the requested information and take hundreds of hours of additional time.

BNSF is working to identify whether it routinely runs any reports containing information about claims made by injured employees and the outcome of these claims. Discovery will be supplemented in accordance with the Rules of Civil Procedure.

BNSF never produced a single document in response to Request for Production No.

7. Instead, it responded:

BNSF incorporates its response to Interrogatory No. 5 as though fully set forth. It is not possible to disclose any reports identified in Interrogatory No. 5 without extensive redactions because the reports contain confidential settlement information, personal or confidential information of individuals not a party to this suit and other confidential and proprietary information. *Id.* BNSF's review of this information is ongoing and it will supplement this response with a privilege log if any documents are identified.

Corrected Order on Sanctions, pp. 5-6.

On September 19, 2017, Dannels served BNSF with a Rule 30(b)(6), Notice of Corporate Depositions, Request for Production, and Subpoena asking BNSF to produce documents and designate a person to testify on topics including: BNSF's evaluation of its handling of Dannels' claim, methods of reserving or accruing losses, and FELA accounting. See App. 2, ¶ 32. BNSF objected to the Rule 30(b)(6) discovery requests, limited responsive production to three new documents, and never

sought or obtained a protective order regarding the M.R.Civ.P. 30(b)(6) topics or requests for production. Corrected Order on Sanctions, pp. 6-7.

Dannels' attorneys traveled to Fort Worth, Texas, in November and December 2017 to depose BNSF's identified experts: Charles Shewmake (BNSF's former general counsel and Vice President of Claims); Rick Lifto (BNSF's former Assistant Vice President of Claims); and Eric Hegi (BNSF's current Assistant Vice President of Claims and Rule 30(b)(6) designee). Hegi was also identified as BNSF's Rule 30(b)(6) designee. All three witnesses had considered and relied on everything in Dannels' underlying claims file, including information withheld from Dannels in discovery, to support their opinions that BNSF acted in good faith. Corrected Order on Sanctions, p. 8.

Shewmake testified that he prepared monthly case summaries on **closed** FELA claim files he forwarded to his superior. After Fort Worth, Dannels served a request seeking production of the closed FELA claim files summaries. BNSF refused to produce them, based on privilege and other objections similar to those previously overruled by the trial court. Corrected Order on Sanctions, pp. 9-10.

During the Rule 30(b)(6) deposition, Hegi refused to answer questions on every topic noticed that BNSF objected to without the benefit of a protective order. See App. 2, ¶ 41. At the end of the Rule 30(b)(6) deposition, Dannels' counsel placed on the record a statement, agreed to by BNSF, that no motion for protective

order was made concerning the deposition and that the designated witness would refuse to answer questions on matters objected to in Defendants' November 17, 2017, Responses to Plaintiff's Rule 30(b)(6) Notice of Corporate Depositions, Requests for Production and Subpoena. See App. 2, ¶ 42.

On January 18, 2018, Dannels moved that BNSF be compelled to produce: (a) Dannels entire FELA claim file and all documents directly related to the handling, evaluation, and settlement of the underlying claim; (b) the monthly summaries referenced in the Shewmake and Hegi depositions; (c) the non-disparagement clauses of all former employees listed as witnesses and the contractual consequences of making a disparaging statement; and (d) documents setting forth the procedures and methodologies BNSF uses in setting loss reserves in FELA cases. Dannels also moved for sanctions for BNSF's discovery abuses, including a default judgment on liability. While the motion to compel was limited to four subject matters, the motion for sanctions was premised on the aggregate discovery abuses perpetrated by BNSF throughout this case. Corrected Order on Sanctions, p. 10.

After moving to compel, Dannels deposed Dione Williams (BNSF's Director of Claims Services) on January 25, 2018. Williams testified that BNSF runs monthly reports on pending claims and lawsuits on a system-wide basis, across the country. Williams admitted that BNSF can run reports on: litigated cases, cases with trial

dates, the number of FELA claims filed against BNSF, pay-outs on FELA claims, the number of litigated FELA claims, the number of FELA cases BNSF has settled, the number and substance of FELA verdicts in recent years, and BNSF's win/loss record on FELA cases in recent years. Williams also prepares an annual executive slide presentation on FELA claims. Dannels learned this information for the first time at Williams' deposition. Corrected Order on Sanctions, pp. 10-11. Williams admitted that besides his department regularly generating the file report information, it could generate specific detailed reports requested in about a week. Corrected Order on Sanctions, pp. 11-12.

After a February 12, 2018, hearing, the trial court ruled on Dannels' second motion to compel on February 22, 2018. It ordered BNSF: produce all claim file documents except those characterized as attorney-client communications and to submit to the court for *in-camera* inspection the purported privileged communications; immediately produce to Dannels the monthly summaries of Shewmake and Hegi reporting to their superiors the results obtained in FELA cases; and produce documents responsive to Dannels' Requests for Production, at a minimum including documents disclosing how reserves are invested, who makes these investments, and the profits generated since Berkshire Hathaway purchased BNSF. Given past difficulties with BNSF, the trial court again warned it was seriously considering sanctions and the types of sanctions that may be appropriate.

See trial court's February 22, 2018, Order on Plaintiff's Motion to Compel, App. 4, at pp. 26-27, and Corrected Order on Sanctions, p. 12.

BNSF did not fairly comply with the trial court's February 22, 2018, order and warning. See App. 2, ¶¶ 45-85. Inexplicably, despite severe sanctions warnings, BNSF refused to produce the discovery ordered and compelled.

BNSF attempted to excuse its discovery abuses at an evidentiary hearing on April 18, 2018. See transcript of April 18, 2018, hearing, App. 5. BNSF offered three witnesses in micro-trial fashion to explain sub-plots BNSF deemed noteworthy for the court's consideration. The trial court exposed the charade in noting BNSF had and withheld information calculated to lead to the discovery of admissible evidence. Besides discovery otherwise compelled, as an additional sanction, the trial court ordered production of: actuarial reports of Willis Towers Watson relating to FELA claims, including risk financing, results expected and obtained, and insurance; annual executive slide presentations on FELA claims; and monthly status reports on FELA claims, as identified in the deposition of Dione Williams, from 2010 to date. See Corrected Order on Sanctions, pp. 18, 20-21.

BNSF continues to refuse to produce the discovery compelled and has filed its writ for supervisory control.

ARGUMENT

A. Supervisory Control is Inappropriate

This Court exercises supervisory control by discretionary writ only under extraordinary circumstances. *Montana State University v. Montana First Jud. Dist. Court*, 2018 MT 220, ¶ 14, 392 Mont. 458, 426 P.3d 541. BNSF claims the trial court is proceeding under a mistake of law and insists this Court must accept supervisory control under *Montana State University*. There, this Court dealt with an issue of first impression when establishing the analysis courts must employ in cases of ESI spoliation and sanctions. It had to reconcile an inadvertent failure to preserve emails with a requested default sanction.

This case differs substantially from *Montana State University*. It does not implicate spoliation claims or a balancing act pitting inadvertence against questionable prejudice. Rather, the trial court-imposed default sanctions on the heels of BNSF's lengthy and ongoing recalcitrance. BNSF spurned trial court discovery orders and needlessly protracted litigation. After employing boilerplate objections and disregarding court orders and sanctions warnings, BNSF feigns surprise and seeks mercy for its insubordination.

B. Default Judgment Against BNSF

District courts have broad discretion to impose discovery sanctions under Rule 37 because they are in the best position to assess the nature and effect of

discovery abuses. *Richardson v. State*, 2006 MT 43, ¶ 21, 331 Mont. 231, 130 P.3d 634. The trial court examined the years-long discovery minutiae in painstaking detail. It ruled BNSF was wrong at nearly every step. Instead of regurgitating the details of every discovery deficiency the trial court addressed, Dannels defers to the Corrected Order on Sanctions, the Affidavit of Conner, App. 2, and the trial court's other discovery orders, App. 3 and 4. The trial court carefully reviewed and considered BNSF's pervasive evasion and abuse. BNSF's indifference to the trial court warnings and the rule of law stands in stark contrast to the trial court's thoughtful analysis and patience. BNSF's discovery conduct is the precise conduct this Court has urged trial courts to condemn and deter.

The example which best encapsulates BNSF's discovery approach is its handling of Interrogatory No. 5 and Request for Production No. 7. At the sanctions hearing, BNSF called its outside counsel, Christopher Decker, to testify. See App. 5, pp. 65-106. Decker worked with BNSF in-house counsel, Jill Rugema, in answering Dannels' discovery. App. 5, p. 86. The discovery responses were based on Rugema's input. App. 5, p. 90. BNSF in-house lawyer, Tom Jayne, was also involved with BNSF's supplemental court-ordered responses. App. 5, p. 93. Both Rugema and Jayne were copied on Shewmake's monthly closing summaries to his superior, Roger Nober. App. 5, p. 101-102. Decker was never informed about the Shewmake and Hegi reports or Williams' workups presented to BNSF leadership

concerning FELA settlements and amounts paid. Decker does not recall being told about contracted actuarial studies dealing with FELA risks and payouts. App. 5, p. 95-98. The trial court used this as an example in observing how BNSF has consistently attempted to conceal information and evade its discovery obligations. To be clear, this is not a reflection on BNSF's outside counsel. The trial court imagined, as Decker alluded to, that outside defense counsel's hands are somewhat tied regarding the existence and possession of internal BNSF documents. Corrected Order, pp. 20-22. As the trial court noted, "On that front, defense counsel necessarily relies on the representations of their corporate client. Yet, with BNSF, there seems to be a corporate pattern, practice, and mindset of superiority, invincibility, or both." Corrected Order, p. 31.

C. Documents Purportedly from Non-Parties

In response to Dannels' Request for Production No. 16, asking for documents relating to the study or review of amounts paid out on FELA claims by consultants, BNSF objected and, in a compelled supplemental response, stated, "BNSF has retained no outside company or consultant to study or review BNSF FELA claims handling practices or procedures and/or amounts paid out on FELA claims." See App. 2, ¶ 77.

BNSF argues production of "non-party" information will somehow prejudice it. Buried within documents produced, Dannels found the April 22, 2002, Business

Plan of BNSF IC. Under the Business Plan, BNSF IC was to “act as a consolidated point for the collection of all relevant claims data (for BNSF).” Loss assumptions by BNSF IC were based on the prior loss experience of BNSF. The Business Plan reports that BNSF LLC **and** BNSF “contract on a regular basis with Tillinghast-Towers Perrin for an actuarial study and review of FELA losses.” This belies BNSF’s compelled discovery response to Request for Production No. 16. The actuarial study fully considers the prior payout patterns and allows for continual developments within the risk management arena and other factors which may impact the timing and size of payments. The Business Plan identifies “ATTACHMENTS,” including Attachment 5, the Tillinghast Actuarial Report, which was not produced. See App. 2, ¶ 49. Faced with BNSF’s denial that no outside company or consultant is retained to study or review BNSF FELA claims, the existence of Tillinghast-Towers Perrin actuarial studies, the interrelationship of BNSF’s sister and holding company, Dannels’ theory of the case, and legitimate requested discovery, the trial court did not abuse its discretion in ordering production of actuarial reports.

D. Purported Attorney-Client and Work Product Privilege

In *Kuiper*, the plaintiff sought discovery, including monthly summary reports of compilations of case history results prepared by in-house counsel for his superiors at Goodyear. The reports “analyzed closed product liability files and reported . . .

the results obtained in each of those files.” Attorney-client and work product privilege do not apply to closed case file reports.

In response to compelled discovery, BNSF produced copies of the Shewmake and Hegi monthly summaries from January 23, 2006, when first generated, until February 15, 2013, the date of Dannels' verdict. Contrary to the order, BNSF redacted all settlement information and failed to produce claim summaries open at the time of the Dannels' verdict and later closed. The court ordered, and Dannels only expects, production of closed claim reports. See App. 2, ¶¶ 71, 74.

No privilege attaches to annual executive slide presentations on FELA claims; and monthly status reports on FELA claims, identified in the deposition of Williams. Dannels does not seek or expect and the trial court did not order production of reserve information on any individual open FELA claim. If there is individualized reserve information on an open claim file, BNSF may redact it without objection or violation of court order.

The trial court zealously safeguarded BNSF's privilege concerns. Despite Shewmake, Lifto and Hegi relying on everything in the claim file to conclude BNSF acted in good faith, the trial court declined to compel production of outside defense counsel's pre-trial reports, factual analyses, strengths/weaknesses, damages assessments, etc. See App. 4. To suggest the sky is falling under the weight of a nationwide privilege waiver is a misnomer. BNSF has not provided this Court with

a single document the trial court erroneously compelled BNSF to produce after its *in camera* inspection.

In *Anderson, et al. v. Montana First Judicial District Court*, Montana Supreme Court Cause No. 09-0176 (May 27, 2009), this Court, on a writ of supervisory control, rejected BNSF's attempt to unilaterally determine privilege. See the *Anderson* Order, App. 6. BNSF cannot unilaterally make privilege determinations. The trial court has ardently protected legitimate privilege assertions. It undertook a thorough analysis of the attorney client and work product privileges under Montana law, and reviewed each document claimed privilege by *in camera* inspection.

IV. CONCLUSION

In making its determinations, the trial court did not abuse its discretion. BNSF has failed to satisfy the burden to obtain the extraordinary remedy it seeks.

DATED this 22nd day of January, 2019.

CONNER & MARR, PLLP

/s/ Dennis P. Conner
DENNIS P. CONNER
P. O. Box 3028
Great Falls, MT 59403-3028
Attorneys for Plaintiff Robert Dannels

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 (4)(3) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced, except for the quoted and indented material; and the word count calculated by Word is not more than 4,000 words.

DATED this 22nd day of January, 2019.

CONNER & MARR, PLLP

/s/ Dennis P. Conner

DENNIS P. CONNER

P. O. Box 3028

Great Falls, MT 59403-3028

Attorneys for Plaintiff Robert Dannels

CERTIFICATE OF SERVICE

Due to a technical e-filing issue with the Montana Supreme Court, the Office of the Clerk of the Supreme Court instructed us to file and serve the foregoing DANNELS' RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL via email. I here certify that I have served true and accurate copies of the foregoing on each of the following via email:

Robert J. Phillips (Attorney)
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street – P. O. Box 7909
Missoula, MT 59807-7909
rjphillips@garlington.com
Representing BNSF Railway Co., Nancy Ahern
Service Method: Email Delivery

Jeff Hedger (Attorney)
HEDGER FRIEND, PLLC
2800 Central Avenue, Suite C
Billings, MT 59102
jhedger@hedgerlaw.com
Representing BNSF Railway Co., Nancy Ahern
Service Method: Email Delivery

Katherine M. Bidegaray (Respondent)
Montana Seventh Judicial District
300 12th Avenue NW, Suite 2
Sidney, MT 59270
KBidegaray@mt.gov
Kimberly.Pulver@mt.gov
Representing: Self-Represented
Service Method: Email and Conventional Delivery

Anthony Michael Nicastro (Attorney)
401 North 31st Street, Suite 770
Billings, MT 59101
nicastro@knightnicastro.com
Representing: Association of American Railroads
Service Method: Email Delivery

William W. Mercer/John D. Sullivan (Attorneys)
HOLLAND & HART, LLP
P. O. Box 639
Billings, MT 59103-0639
wwmerc@hollandhart.com
jdsullivan@hollandhart.com
Representing: The Montana Chamber of Commerce
Service Method: Email Delivery

CONNER & MARR, PLLP

/s/ Dennis P. Conner
DENNIS P. CONNER
P. O. Box 3028
Great Falls, MT 59403-3028
Attorneys for Plaintiff Robert Dannels