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FILED

03/12/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 18-0693

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 18-0693

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

Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT
COURT, CASCADE COUNTY, HONORABLE
KATHERINE M. BIDEGARAY, Presiding

Respondent.

FILED

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State of Montana

ORDER

On December 11, 2018, Nancy Ahern and BNSF Railway Company (collectively “BNSF”) petitioned this Court for a Writ of Supervisory Control and Stay of Proceedings in the Eighth Judicial District Court, Cause No. BDV-14-001. BNSF asks this Court to vacate the District Court’s Sanctions Order, which entered a default against BNSF for discovery abuses and ordered BNSF to produce certain documents which BNSF describes as privileged. We ordered a response and Robert Dannels, Plaintiff in the underlying action, responded and opposed the Petition.

The cause underlying this Petition is a 2014 bad faith claim filed by Dannels against BNSF. Dannels is a former BNSF employee. After obtaining a judgment against BNSF in a Federal Employers’ Liability Act (FELA) action, Dannels sued BNSF under common law and § 33-18-201, MCA, which prohibits certain claim settlement practices. The parties became embroiled in a number of discovery disputes. On January 26, 2017, the District Court ordered BNSF to provide Dannels with some of the discovery sought, determining that despite BNSF’s assertions, much of the discovery was not protected attorney-client communications or protected opinion work product.

Pertinent to the present matter are BNSF's responses to two discovery requests. In Interrogatory No. 5, Dannels asked if BNSF generates reports containing information about claims made by injured BNSF workers and the outcome of their claims. In Request for Production No. 7, Dannels asked BNSF to identify and produce each such report utilized in the last fifteen years. After the District Court first attempted to compel BNSF to answer, BNSF offered supplemental responses as follows:

BNSF's Supplemental 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 supplemented this response further.

BNSF's Supplemental Response to Request for Production No. 7:

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. BNSF's review of this information is ongoing and it will supplement this response with a privilege log if any documents are identified.

Following receipt of these responses, Dannels scheduled depositions of three experts identified by BNSF: Charles Shewmake (BNSF's former general counsel and Vice President of Claims), Rick Lifo (former Assistant Vice President of Claims), and Eric Hegi (current Assistant Vice President of Claims). Hegi was also identified by BNSF as its Rule 30(b)(6)

designee.¹ During the depositions, Dannels learned that Shewmake had prepared monthly case summaries on closed FELA claim files and that Hegi prepared the monthly summaries after Shewmake retired. Dannels sought production of these summaries and BNSF refused to provide them. Because BNSF had disclosed that these three expert witnesses were expected to testify at trial that Dannels' FELA claim was evaluated reasonably, BNSF made reasonable offers, liability was never reasonably clear, and the claims department used good-faith practices, Dannels moved to compel BNSF to produce: (1) Dannels' entire claims file; (2) the monthly case summaries referenced in the witnesses' depositions; (3) non-disparagement clauses of all former employees listed as witnesses; and (4) documents setting forth the procedures and methodologies BNSF used in setting loss reserves for FELA cases.

Dannels then deposed Dione Williams, BNSF's Director of Claims Services. Contrary to BNSF's Supplemental Answer to Interrogatory No. 5, Williams testified that BNSF runs monthly reports on pending claims and lawsuits and that Williams prepares an annual executive presentation on FELA claims. Williams admitted that BNSF can run various reports about FELA litigation, such as the number of litigated claims, the verdicts, and BNSF's win/loss record. Williams admitted his department regularly runs such reports and could generate the reports in about a week.

On February 22, 2018, the District Court issued an Order on Dannels' Motion to Compel. The District Court found BNSF had waived work-product privilege because its expert witnesses had unfettered access to the information, including information BNSF unjustifiably withheld from production, and that BNSF's actions precluded Dannels from meaningfully cross-examining these witnesses. The District Court ordered BNSF to produce: "all documents" directly related to the handling, evaluation, and settlement of Dannels' underlying claim, except those documents that "legitimately meet" the definition of attorney-client privilege; to specify documents or redactions on a privilege log; to highlight

¹ BNSF identified all three of these witnesses as "expert witnesses" in its Lay and Expert Witness Disclosure, filed on November 20, 2017.

portions of documents for which BNSF asserted attorney-client privilege; the monthly summary reports over the last twenty years; and documents showing methods and criteria used for reserving or accruing losses related to FELA claims since Berkshire Hathaway purchased BNSF.

The District Court noted it was “seriously considering” sanctions against BNSF, and it asked the parties to submit proposed orders regarding sanctions. On April 18, 2018, the District Court held a hearing on the sanctions motion. On November 16, 2018, it issued a Corrected Order on Sanctions. As part of the sanctions, the District Court entered a default judgment on liability and causation against BNSF. The District Court also ordered BNSF to produce the following:

(A) All actuarial reports of Willis Towers Watson (including its predecessors and successors) from 2010 to date relating to FELA claims, including risk financing, results expected and obtained, and insurance;

(B) All annual executive slide presentations on FELA claims, as identified in the deposition of Dione Williams, from 2010 to date; and

(C) All monthly status reports on FELA claims, as identified in the deposition of Dione Williams, from 2010 to date.

Supervisory control is an extraordinary remedy that is sometimes justified when (1) urgency or emergency factors make the normal appeal process inadequate; (2) the case involves purely legal questions; and (3) in a civil case, the district court is proceeding under a mistake of law causing a gross injustice or constitutional issues of state-wide importance are involved. M. R. App. P. 14(3).

Pretrial discovery disputes are typically not appropriate for an exercise of supervisory control. As we have previously noted, “[i]t is not our place to micromanage discovery” *Mont. State. Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 17 n. 12, 392 Mont. 458, 426 P.3d 541 (internal quotation omitted). Nonetheless, this Court will sparingly exercise supervisory control over interlocutory discovery matters under truly extraordinary circumstances where the lower court is proceeding under a demonstrable

mistake of law and failure to do so will place a party at a significant disadvantage in litigating the merits of the case. *Mont. State Univ.-Bozeman*, ¶ 17 n. 12; *Hegwood v. Mont. Fourth Jud. Dist. Ct.*, 2003 MT 200, ¶ 6, 317 Mont. 30, 75 P.3d 308.

In its Petition, BNSF first argues the Sanctions Order is void because FELA preempts Dannels' underlying bad faith claim. BNSF urges this Court to overrule *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, 312 Mont. 498, 60 P.3d 418, in which we rejected this very argument. This is BNSF's second attempt at raising FELA preemption as a basis for supervisory control in this case. As we concluded in our February 20, 2018 Order denying BNSF's previous Petition for Writ of Supervisory Control, applying existing precedent is not a "mistake of law," and we see no reason why a normal appeal is an inadequate process for addressing BNSF's request to revisit our holding in *Reidelbach*. See M. R. App. P. 14(3).

Second, BNSF argues the District Court erred in entering a default against it as a discovery sanction. A district court has broad discretion when ordering discovery sanctions. M. R. Civ. P. 37; *Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, ¶ 15, 379 Mont. 314, 350 P.3d 52. We have consistently recognized that district courts are in the best position to assess "which parties callously disregard the rights of their opponents and other litigants seeking their day in court and [are] also in the best position to determine which sanction is the most appropriate." *Smith v. Butte-Silver Bow Cty.*, 276 Mont. 329, 332, 916 P.2d 91, 93 (1996) (internal citations and alterations omitted). A district court may enter a default as a sanction for a failure to produce discoverable information. M. R. Civ. P. 37(c)(1)(C), (b)(2)(A)(vi). Entering a 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*, ¶ 20.

BNSF maintains the sanction of default is arbitrary because the documents compelled by the Sanction Order were not sought by Dannels in his motion to compel. A district court has broad discretion when assessing what is encompassed in a discovery request. See *Richardson v. State*, 2006 MT 43, ¶¶ 51-52, 331 Mont. 231, 130 P.3d 634. This issue

may properly be reviewed on direct appeal under an abuse of discretion standard. *See Smith*, 276 Mont. at 332-33, 916 P.2d at 92-93. BNSF fails to convince us that the District Court made a purely legal error, and we are satisfied an appeal would afford BNSF an adequate remedy. *See* M. R. App. P. 14(3); *see also Bullman v. Curtis*, 2011 Mont. LEXIS 449, at *4-5, 362 Mont. 543 (Aug. 9, 2011).

Third, BNSF argues that discovery sanctions against Ahern are inappropriate given that there is no mention of any alleged discovery abuse perpetrated by Ahern or any basis in the record for any sanction against her. In Dannels' response to this Petition, he asserts that his motion for sanctions was against BNSF and that he will move to dismiss with prejudice all claims against Ahern. Thus, this argument is moot. BNSF also argues the District Court cannot fault BNSF for failing to produce documents and information from non-party corporate entities. The District Court considered the interrelationship of the non-party corporate entities and determined that "[g]iven their relationships, BNSF must have within its possession, custody or control of the documents discussed" After examination of the record and BNSF's Petition, BNSF has not demonstrated that the District Court is proceeding under a demonstrable mistake of law or that a direct appeal is an inadequate remedy for determining potential District Court error in imposition of this sanction. *See Mont. State. Univ.-Bozeman*, ¶ 17 n. 12; *Hegwood*, ¶ 6; M. R. App. P. 14(3).

Finally, BNSF argues that a writ of supervisory control is warranted in the present case because BNSF will suffer irreparable harm if it is forced to disclose certain privileged documents as ordered by the District Court. BNSF alleges that the documents the District Court compelled it to produce contain privileged work-product information.

BNSF also alleges that the monthly reports contain privileged attorney-client information, including cases which are currently being litigated. Dannels responds that the monthly reports pertain only to closed cases and Dannels does not seek documents pertaining to active litigation. BNSF has not demonstrated that the District Court is proceeding under a demonstrable mistake of law and that failure to grant supervisory control will place BNSF at a significant disadvantage in litigating the merits of the case. *See Mont. State. Univ.-*

Bozeman, ¶ 17 n. 12. We reiterate that the District Court, that has been intimately involved in this matter, was in the best position to enforce discovery rights and limits and to assess and sanction discovery abuses. See *Ascencio v. Halligan*, 2019 Mont. LEXIS 77, at *2-3 (Feb. 19, 2019); *Richardson*, ¶ 21; *Smith*, 276 Mont. at 332, 916 P.2d at 93.

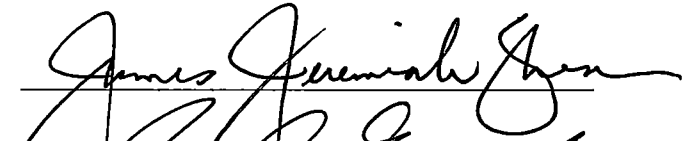

With respect to BNSF's preemption argument, as we noted in our previous order denying BNSF's petition for a writ of supervisory control, this is an issue for which the normal appeal process is adequate. Regarding the substance of the District Court's Sanction Order because of BNSF's alleged discovery abuses, BNSF has not demonstrated the truly extraordinary circumstances that warrant our sparing exercise of supervisory control over interlocutory discovery matters. See *Mont. State. Univ.-Bozeman*, ¶ 17 n. 12. Accordingly,

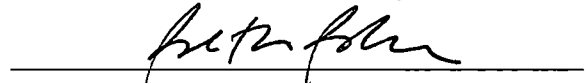

IT IS ORDERED that BNSF's Petition for a Writ of Supervisory control is DENIED and DISMISSED.

The Clerk is directed to provide copies of this Order to all counsel of record, including counsel for the *Amici Curiae*, and to the Honorable Katherine Bidegaray.

Dated this 12th day of March 2019.


Chief Justice



Justices

Justice Laurie McKinnon dissents from the Court's Order.

I did not sign the Court's previous order dated February 20, 2018, denying BNSF's Petition for Writ of Supervisory Control and concluding that *Reidelbach* was controlling on the question of FELA preemption. I will say no more than that.

First, the facts and circumstances of *Reidelbach* are distinguishable from those here. In *Reidelbach*, the parties had neither settled nor tried the FELA claims. Based on BNSF's negotiations and representations, Reidelbach believed BNSF would compensate him adequately without the need to pursue a FELA action. Later, when the expected damages did not materialize, Reidelbach brought his state law bad-faith claims in conjunction with his FELA claims. Here, in contrast, Dannels sued BNSF under FELA in 2013, and a jury awarded Dannels \$1.7 million. BNSF fully satisfied that amount, and the FELA case concluded. A year later, Dannels filed this second lawsuit arising from the same injuries and now alleges BNSF violated the UTPA when it defended the FELA action. More particularly, Dannels alleges BNSF's misconduct caused him emotional distress and requests punitive damages—relief which FELA does not allow. In both petitions requesting this Court exercise supervisory control, BNSF urged the Court to overrule or reconsider *Reidelbach* and find preemption of Dannels' state-law claims under FELA.

Second, there is ample federal authority, not discussed in *Reidelbach*, which appears to provide FELA is the exclusive remedy for injured railroad workers; that Congress intended FELA to "occupy the field"; and that FELA preempts state-law claims based on injuries arising from a railroad's conduct. I would order further briefing to address the preemption issue and this Court's decision in *Reidelbach*.

This case has now grown even more cumbersome because the District Court has entered a default when there still lingers a question of preemption; the Court is affirming an order for sanctions requiring BNSF to produce documents that are otherwise undiscoverable, *but for the case's status as a UTPA action*; and the documents ordered to be disclosed are potentially protected pursuant to the attorney work-product and attorney-client privileges. I would order further briefing and address the question of whether FELA preempts the Dannels' state-law claims.