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Attorneys for Petitioners

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 18-0693

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.

PETITIONER'S EMERGENCY
MOTION FOR AN INTERIM STAY
OF PROCEEDINGS AND
SUPPLEMENTAL MOTION FOR
STAY PENDING RESOLUTION OF
APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Petitioner Burlington Northern Railroad Company (“BNSF”) respectfully moves this Court pursuant to Montana Rule of Appellate Procedure 16 for an emergency interim stay of the effect of its denial of petitioners’ Petition for a Writ of Supervisory Control, and to stay the underlying proceedings before the district court, until it rules on Petitioners’ pending Motion for a Stay. BNSF also hereby supplements its pending Motion for Stay. An immediate, interim stay is necessary because, notwithstanding the pending stay request in this Court, Robert Dannels (“Dannels”) has moved to impose sanctions on BNSF that will accrue daily, and the district court has set a contempt and sanctions hearing, and ordered BNSF’s General Counsel and outside counsel to appear, on April 5, 2019.

GROUND FOR THIS MOTION

On March 22, 2019, Petitioners filed a Petition for a Writ of Certiorari before the U.S. Supreme Court on the grounds that Montana’s “bad-faith” legal regime is preempted by federal law—the Federal Employers Liability Act (“FELA”)—and that the Montana Supreme Court erred in *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, 312 Mont. 498, 60 P.3d 418, in holding otherwise and erred here in refusing to dismiss Dannels’s claims in this case as preempted. The need for urgent review by the Supreme Court of the United States—and for a stay from this Court pending the disposition of the petition—arises from the fact that the district court has ordered BNSF to turn over

privileged, confidential, or otherwise protected materials that would not be discoverable but for the fact that Dannels has been permitted to pursue his preempted “bad-faith” claims. *See* Order Denying Petition for Writ of Supervisory Control 8 (McKinnon, J., dissenting) (“[T]he 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 . . .*”).

Following this Court’s denial of petitioners’ Petition for a Writ of Supervisory Control on March 12, 2019, petitioners promptly moved this Court on March 18 for an order staying the effect of the Court’s denial of the Petition for a Writ of Supervisory Control, and staying the underlying proceedings before the district court, pending the disposition of BNSF’s Petition for a Writ of Certiorari before the U.S. Supreme Court. Plaintiff Robert Dannels opposed that motion on March 26, 2019, and the motion remains pending.

On March 14, the district court held a conference and ordered BNSF to complete its production of the privileged materials by March 22, 2019. BNSF advised the court that it would seek a stay in this Court and that it would be filing a Petition for a Writ of Certiorari. On March 22, BNSF filed its petition with the U.S. Supreme Court. *See* Exhibit A. BNSF advised counsel for Dannels on March 25 that it would await a decision on the pending motion for a stay in this Court before producing the privileged documents.

Notwithstanding the pending Motion for a Stay in this Court, Dannels filed a motion for sanctions in the district court on March 28, 2019 (Dkt. 293-294).

Dannels asked the Court to strike BNSF's Answer; accept all of Dannels's allegations as true; and to hold an evidentiary hearing on damages in which only Dannels will be permitted to submit evidence. Dannels further requested that the district court issue an order directing BNSF and its counsel to appear and show cause as to why contempt sanctions should not be granted. Dannels also demanded that Roger Nober—BNSF's Executive Vice President, Law and Corporate Affairs—be ordered to appear in person, despite no evidence that Mr. Nober had any involvement with this litigation. Dannels requested that counsel for BNSF from Hedger Friend, PLLC and from Garlington, Lohn & Robinson, PLLP be directed to appear. Dannels requested that “BNSF be fined \$25,000.00 a day from March 22, 2019, until the date of the damages hearing or until it fully complies with the Court's March 15, 2019, Order.”

BNSF filed its objection with the district Court to the proposed order the next day. *See* Exhibit B. It explained that contempt against BNSF's attorneys was wholly inappropriate, as this Court has exclusive jurisdiction of all matters involving the conduct of attorneys practicing law in Montana. *See Schuff v. A.T. Klemenec & Son*, 2000 MT 357, ¶¶ 33–34, 303 Mont. 274, 16 P.3d 1002. BNSF further pointed out that there was no evidence Mr. Nober was involved in BNSF's

defense of the case in the trial court. It advised the court that Mr. Hedger is out of the country and cannot be present in Montana on April 5, and that the time for responding to the citation was unreasonably short. It offered to produce Tamara Middleton from BNSF's office of General Counsel.

On Saturday, March 30, the district court issued an order, consistent with Dannels's motion, directing Mr. Nober and BNSF's outside counsel to appear at a hearing on April 5, 2019 to show cause as to why "contempt sanctions should not be imposed against them and Defendant BNSF Railway Company for the disobedience of this Court's discovery orders." *See* Exhibit C (Dkt. 296).

In light of these new developments, BNSF requests an emergency, interim stay of the district court proceedings pending this Court's decision on the pending motion for a stay of judgment and of proceedings pending appeal to the Supreme Court of the United States. Dannels has threatened BNSF with sanctions that will accrue daily, and the district court is moving forward with contempt and sanctions hearing against BNSF's General Counsel and outside lawyers. If the trial court issues the requested sanctions, even in part, BNSF will suffer irreparable harm. There is no reason to allow the hearing to go forward or such sanctions to issue while a motion to stay the proceedings is pending before this Court. These developments also underscore the need for a longer stay pending resolution of the Petition for a Writ of Certiorari in the Supreme Court of the United States. The

Supreme Court of the United States should be given an opportunity to address the significant FELA preemption question presented by this case. If Dannels's claim is preempted, then none of the discovery disputes, sanctions, contempt orders, and time and expenses that both parties are now incurring would be necessary, because the "bad faith" claim itself if preempted.

Additionally, counsel cannot at once defend its client while at the same time defending himself or herself. Counsel can mount a defense of itself only by revealing privileged communications with the client. BNSF's counsel is in the untenable position of either revealing privileged information without the client's consent or facing discipline from the district court. The Rules of Professional Conduct are meant to protect the public and the lawyer's clients and may not be used to gain an advantage in litigation. *See Schuff*, ¶ 61.

WHEREFORE, BNSF moves that this Court issue an emergency interim stay of the effect of its denial of Petitioners' Writ of Supervisory Control in the above-captioned matter, and a stay in the proceedings of the underlying matter, *Dannels v. BNSF Railway Company et al.*, BDV-14-001, until it rules on the pending motion for a stay. BNSF also hereby supplements its request for a stay pending the Supreme Court's resolution of the pending Petition for a Writ of Certiorari in this matter.

Counsel for BNSF has contacted opposing counsel and they object to this Motion.

DATED this 1st day of April, 2019.

/s/ Robert J. Phillips

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Motion 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 1241 words, excluding Certificate of Service and Certificate of Compliance.

/s/ Robert J. Phillips
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Robert J. Phillips, hereby certify that I have served true and accurate copies of the foregoing Motion - Stay to the following on 04-01-2019:

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Dated: 04-01-2019