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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

<p>JASON C. MACDONALD,</p> <p>Plaintiff,</p> <p>vs.</p> <p>BNSF RAILWAY COMPANY, et al.,</p> <p>Defendants.</p>	<p>No. DDV-16-0549</p> <p>PLAINTIFF'S RESPONSE TO BNSF'S MOTION FOR SCHEDULING ORDER</p> <p>Also applicable to: <i>In re Asbestos Litigation, Consolidated Cases</i> Cause No. AC 17-0694</p>
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INTRODUCTION

BNSF Railway Company's ("BNSF") *Motion for Scheduling Order* (attached hereto as **Exhibit A**) is premature. This case involves identical claims and defenses to those currently pending before the Montana Supreme Court in the *Barnes et al. v. BNSF et al.* case. Just like in *Barnes*, Plaintiff here alleged a claim against BNSF for strict liability and BNSF alleged both preemption and common carrier defenses thereto. Likewise, BNSF alleged identical non-party defenses. Recognizing the impact of the Supreme Court's forthcoming *Barnes* decision on other similar cases, the Asbestos Claims Court stated:

My inclination on this is that the cases against Maryland Casualty and BNSF are effectively stayed across all of these cases because

whatever the Supreme Court says is potential dispositive as to these issues.

* * *

[The] Asbestos Court judges are not going to be actively setting cases for trial against Maryland Casualty or BNSF in the Asbestos Claims Court pending resolution of the Writs of Supervisory Control, we just don't believe that's a good use of resources at this time.

Exhibit B - Asbestos Claims Court Transcript (February 19, 2019), p. 4, lns. 12-16; p. 6, lns. 19-25.

The Barnes case will be fully briefed by July 1, 2019. As BNSF points out in its Exhibit G to its *Motion for Scheduling Order*, it could take up to 120 days thereafter, or until November 1, 2019, for the Montana Supreme Court to issue its decision. Asking the Court to issue a scheduling order for a 2019 trial at this time is premature as the tasks outlined in that scheduling order are contingent on the Montana Supreme Court's forthcoming decisions in *Barnes*. Whether the trials proceed with the claim that BNSF is strictly liable for conducting an abnormally dangerous activity, or whether those trials include a general negligence claim as well, greatly changes the scope of discovery, the expert witness disclosures, and related depositions.¹ Simply put, it is not a good use of judicial resources to set this case for trial pending the disposition of the *Barnes* case by the Montana Supreme Court.

¹ Plaintiffs have not opposed BNSF's requests to take the deposition of Plaintiff Jason MacDonald. In January, Plaintiff provided dates to BNSF in that regard. Plaintiff received BNSF's *Notice of Deposition* on April 23, 2019. That deposition should not be affected by the Montana Supreme Court's ruling regarding BNSF's abnormally dangerous activity or BNSF's improper non-party defenses because Plaintiff's testimony will be focused on his exposures and his damages. Thus, Plaintiff's deposition is proceeding as noticed on June 3, 2019, at the undersigned's law offices.

I. Procedural Background.

Plaintiff provides the Court with the following procedural background of the events in this case that occurred before the Asbestos Claims Court. That background, along with the Asbestos Claims Court's orders entered herein, directly refute BNSF's accusation that Plaintiff "deployed every effort to delay the trial in this case." BNSF's Motion for Scheduling Order, p. 4.

At BNSF's request, this case was selected as a lead case by the Asbestos Claims Court on March 20, 2018. On April 12, 2018, Plaintiff filed a *Motion for Deferred Docket* asking the Asbestos Claims Court to establish a deferred docket for claimants, like Plaintiff, who had been diagnosed with a non-malignant asbestos related disease and had normal or mild lung function as evidenced in PFTs. The basis for that request was multifaceted, but in essence focused on the unconstitutionality of forcing such Plaintiffs to litigate claims filed solely to their preserve statute of limitations, but before the full nature and extent of Plaintiffs' damages could be determined due to the fact one cannot determine to a reasonable medical probability whether a given normal or mild Plaintiff will progress to moderate or severe disease. BNSF opposed Plaintiff's motion and sought to litigate Plaintiff's case even though he had "normal" lung function and did not know the full extent of his damages.

The Asbestos Claims Court granted Plaintiff's request for a deferred docket. *See Exhibit C, Order Re: Plaintiffs' Motion for Deferred Docket (September 13, 2018)* ("Deferred Docket Order"). In doing so, the Asbestos Claims Court noted:

Against this backdrop, and as a result of mass screenings at the CARD Clinic, these Plaintiffs have a diagnosis of an ARD that has been communicated to their lawyers. Pursuant to *Kaeding*, they had no option but to file their Complaints to toll the statute of limitations.⁴³ However, completely distinguishable from *Kaeding*, these Plaintiffs generally were not suffering from any symptoms of

an ARD that lead them to seek medical treatment. Instead, consistent with their exposure histories, the experiences of their family and community members, and at the behest of the CARD Clinic, they took advantage of early precautionary screening opportunities. They now have a diagnosis, and attendant fear and anxiety regarding that diagnosis, but the ARD has not manifested in any physical symptoms or impairment.

Fn 43 - Additionally, even in this context, the Defendants are still asserting the statute of limitations defense against these claimants—arguing that taking into consideration their exposure history they should have been screened earlier.

Ex. C - Deferred Docket Order, p. 9. The Asbestos Claims Court further stated:

In these cases, the parties agree there is no witness who can testify to a reasonable degree of medical certainty when, or whether, any particular Plaintiff's ARD diagnosis will progress to impairment. As such, these Plaintiffs would be foreclosed at trial from making a claim for future damages based on a future impairment as a matter of law.

Ex. C - Deferred Docket Order, p. 10. The Asbestos Claims Court further agreed:

A deferred docket, Plaintiffs assert, provides the opportunity for those who may become severely ill to recover fully if their unimpaired condition progresses to cancer or mesothelioma. The Court agrees.

Ex. C - Deferred Docket Order, p. 12 (footnotes omitted). Thereafter, the Asbestos Claims Court noted the constitutional issues posed by this backdrop and ordered:

The Asbestos Claims Court possesses “the inherent power to do those acts necessary to ensure [its] proper functioning.” Section 3–1–113, Montana Code Annotated codifies the concept of inherent power and “provides that when jurisdiction is conferred on a court or judicial officer, all the means necessary for the exercise of that jurisdiction are also given.” A docketing system in which the sickest plaintiffs’ claims are prioritized and objective medical criteria is required for claim activation advances the ACC’s legislative and constitutional mandates of efficiency and equity. In so ruling, the Court finds this determination properly balances the competing practical and constitutional interests of the parties within the context of existing Montana law.

* * *

Referring to the Plaintiff's Master Claim List, the following cases will be placed on the deferred docket:

- (a) The Plaintiff has been diagnosed with a nonmalignant ARD;
- and
- (b) The Plaintiff has a mild or normal disease severity.

Ex. C - Deferred Docket Order, p. 16 (emphasis added, footnotes omitted). The Court asked Plaintiffs' counsel to file a Master Claims List identifying all Plaintiffs that "have been transferred to the Court's Deferred Docket." See Order Re: Master Claims List (September 24, 2018).

Because Plaintiff Jason MacDonald's most recent PFTs confirmed he has "normal" lung function, pursuant to the Deferred Docket Order, Plaintiff was transferred to the Deferred Docket along with close to 1,200 other similarly situated Plaintiffs. As a result, the deposition of Plaintiff Jason MacDonald was vacated by Defendant International Paper Company. See **Exhibit D** – International Paper Company's Notice of Cancellation of Deposition of Jason MacDonald (October 19, 2018). Despite that clear fact, BNSF continues to improperly accuse Plaintiff of cancelling the deposition. Additionally, because Plaintiff's case was now on the deferred docket, the case was stayed including any pending discovery requests. Plaintiff's counsel stated as such to BNSF's counsel in a September 21, 2018 email:

Hello Steve,

We are in receipt of your letter attached to your email below (and attached again for the benefit of Jean, Jennifer, and Vernon, who are also copied on this email). It is Plaintiffs' understanding that the Court's *Order re: Plaintiffs' Motion for a Deferred Docket* placed Mr. MacDonald's case on the deferred docket. As such, the case is stayed, including any discovery. I have confirmed that is IP's position as well. In that regard, IP has confirmed it will be cancelling the Mr. MacDonald's deposition.

Please let us know if you have a different position on the status of Mr. MacDonald's case. As always, should you have any questions, please feel free to contact us.

Regards,
Jinn
Jinnifer Jeresek Mariman | Attorney

BNSF's Motion for Scheduling Order, Ex. E (email attached again hereto as **Exhibit E** for Court's convenience). BNSF did not respond to that email.

Instead, on October 5, 2018, BNSF filed its *Motion Seeking Active Status*. See **Exhibit F**. In doing so, BNSF confirms that the Asbestos Claims Court did in fact transfer the case to the Deferred Docket.

MacDonald's case is set for trial April 15, 2019. The Court has not vacated the scheduling order, but in a separate order in the matter of *Ward, et al. v. International Paper, et al.*, DV-10-839, the Court specifically references Mr. MacDonald's claim being transferred to the Deferred Docket. Because Mr. MacDonald's claim meets the criteria for active status, Defendants respectfully request that the Court move his case back to active status and the April 15, 2019 trial date be maintained.

Ex. F – BNSF's Motion Seeking Active Status, pp. 1-2 (emphasis added). BNSF's own pleading refutes its current accusation that "Plaintiff then unilaterally placed MacDonald on the 'deferred docket.'" BNSF's Motion for Scheduling Order, p. 4.

BNSF provided the Asbestos Claims Court with outdated PFTs from 2016 indicating Plaintiff had "mild" lung function. Plaintiff provided the Asbestos Claims Court with Plaintiff's most current PFTs in 2018 which indicated Plaintiff has "normal" lung function. In response, the Asbestos Claims Court activated Plaintiff Jason MacDonald's case on December 19, 2018 and provided the following clarification of the Deferred Docket Order:

The Court finds that MacDonald's 2015 and 2016 pulmonary function tests are sufficient to meet medical criteria and move the case onto the Active Docket. Once a plaintiff has been diagnosed with an ARD, any subsequent pulmonary function tests which demonstrates: (i) a Total Lung Capacity (TLC) measurement of less than 80% of predicted, or (ii) a forced Vital Capacity (FVC)

of less than 80% of predicted, and a FEV1/FVC ratio greater or equal to 65% is sufficient to qualify for the Active Docket.

Considering the timing of this Order, the *Rule 16 Scheduling Order* currently in place is VACATED. A new *Rule 16 Scheduling Order* will be issued by Judge Parker.

See BNSF's Motion for Scheduling Order, Ex. F - December 19, 2018 Order (attached again hereto as **Exhibit G** for the Court's convenience) (emphasis added). That Order directly refutes BNSF's accusation, that "the parties were no closer to being ready for trial because Plaintiff delayed discovery giving Judge Eddy no option but to vacate the April 2019 trial setting." *Id.* (emphasis added).

On December 21, 2018 this Court entered an *Order Setting Scheduling Conference*. Thereafter, on January 15 and 18, 2019, the Asbestos Claims Court entered the subject *Orders* in *Barnes* and gave direction to all counsel at the February 19, 2019, hearing as to the status of other cases given BNSF's and Maryland Casualty's applications for *Writs of Supervisory Control*. Thereafter, Plaintiff requested the Court vacate the March 21, 2019 scheduling conference in the interests of judicial economy, which the Court vacated.

II. Entering a Scheduling Order At This Time Is Premature.

The Asbestos Claims Court has clearly stated that:

[The] Asbestos Court judges are not going to be actively setting cases for trial against Maryland Casualty or BNSF in the Asbestos Claims Court pending resolution of the Writs of Supervisory Control, we just don't believe that's a good use of resources at this time.

Exhibit B - Asbestos Claims Court Transcript (February 19, 2019), p. 6, Ins. 19-25. The context of that direction is foundational to the Court's analysis in resolving BNSF's *Motion for Scheduling Order*. The Asbestos Claims Court had previously told the parties that it did not

want the parties presenting cases that the parties would like set for trial. At the November 20, 2018, hearing with the Asbestos Claims Court, the following exchange occurred.

MR. KOVACICH: . . . I believe it would be appropriate now to set a few more cases for trial at some point later next year.

THE COURT: We're going to. . . . So I would anticipate in January we'll start setting cases for September or October of next year. . . . Any questions about that?

MR. KNIGHT [counsel for BNSF]: Your Honor, do you want us to be prepared to present cases that we would like to set for trial?

THE COURT: Um, I don't know that you're going to have that option, to tell you the truth And then you're not going to have much say on the cases that you try because I'm going to look at the body of cases in front of me and my calendar here and I'm just going to start setting cases.

Anything else? I can't guarantee that, other judges might view that differently, but it's sort of a lot of extra work, frankly, to try to come to some agreement on which cases we're going to try and which ones we're not. Okay?

Exhibit H –Asbestos Claims Court Transcript (November 20, 2018), p. 25, ln. 12-p. 28, ln. 9.

Thereafter, at the February 19, 2019, Asbestos Claims Court hearing, the attorneys in the *Coyle* case, a case subject to the Montana Supreme Court's Order staying all Libby asbestos cases, had previously come to an agreement that case should proceed. However, counsel was mindful of the Court's prior direction with respect to setting cases for trial and the following exchange occurred with the Asbestos Claims Court:

THE COURT: All right, thank you. And then with that the same, obviously, with Barnes. My inclination on this is that the cases against Maryland Casualty and BNSF are effectively stayed across all of these cases because whatever the Supreme Court says is potential dispositive as to these issues. However, it's my understanding that Mr. Kovacich, Mr. Snipes, and Mr. Johnson, and perhaps Mr. Knight have requested Judge Pinski to set a scheduling

order in a case against BNSF. I don't have the Kovacich Snipes cases on my Master Claims List. So with that, Mr. Johnson?

MR. JOHNSON: Good morning, Your Honor --

THE COURT: Peeler?

MR. JOHNSON: So Mark Peeler is the PR for the Estate of Morris Coyle, who is an employee of BN. That -- this issue was going to be brought up at this hearing, but last week -- it kind of needs a little bit of explanation. Last week we had a deposition in Mr. Coyle's case and Monica Peeler was deposed by the Railroad. At that deposition Mr. Kovacich affirmed to BN counsel that this was a case that was in the ACC; I understand that it was on our Master List that we filed a year ago at the direction of this Court. We agreed to proceed with discovery in this case with the understanding that it was our position that this was an ACC claim, so at the deposition we confirmed that this was an ACC case.

The next day we received a motion for a scheduling conference in Coyle. I think it was filed on the Monday before the deposition last week, so we received that Wednesday. We already had a scheduling conference in Dunlap, another FELA case that's not in the ACC, on that Thursday.

So Coyle came up in front of Judge Pinski during that scheduling conference. At that scheduling conference it was agreed that Coyle would be scheduled for trial this fall. But again, it's our position that that case is in the ACC because he's a railroad employee who was exposed to asbestos while working in and around Libby.

THE COURT: And the claims against the Railroad are the same types of claims as are pending before the Supreme Court in the Barnes case?

MR. JOHNSON: Is the Barnes case a --

THE COURT: It's a strict liability for abnormally dangerous activity.

MR. JOHNSON: The Coyle case is a FELA case, Your Honor.

THE COURT: All right, I understand. All right. Well, with that, Judge Pinski has jurisdiction over the case, if you want to set it for trial and go try it it's fine with me, I don't have any problems with that.

MR. JOHNSON: Okay.

THE COURT: The point of this is just that the Asbestos Court judges are not going to be actively setting cases for trial against Maryland Casualty or BNSF in the Asbestos Claims Court pending resolution of the Writs of Supervisory Control, we just don't believe that's a good use of resources at this time. But if you want to request a case to be set, by all means.

Exhibit B - Asbestos Claims Court Transcript (February 19, 2019), p. 4, ln. 10-p. 7, ln. 1
(emphasis added).

The Court will reach its own conclusions as to whether BNSF's cherry-picked quote (i.e. p. 6, ln. 19-p. 7, ln. 1) from the full colloquy above meets this Court's standards of candor. However, it is clear that the Asbestos Claims Court was advised the case against BNSF at issue in that colloquy was a FELA case, not a community negligence case like Plaintiff's case here and like *Barnes* pending before the Montana Supreme Court. The Asbestos Claims Court stated it was agreeable to the specific *Coyle* case going forward (so long as Judge Pinski agreed) given that (a) it was a joint request and (b) it was an FELA case presenting different issues than those presented by the *Barnes* pending writs. The essential point is that the Asbestos Claims Court advised the parties that the courts "just don't believe that's a good use of resources at this time" to set cases for trial against BNSF pending resolution of the Writs of Supervisory Control.

The wisdom of Judge Eddy's position is self-evident. For example, the scope of the claims proceeding against BNSF will absolutely determine the parties' expert disclosures and discovery efforts. If the Montana Supreme Court affirms the Asbestos Claims Court's finding that BSNF was engaged in an abnormally dangerous activity, then the parties' expert disclosures and discovery will simply focus on causation of Plaintiff's injuries and the amount of damages. However, if negligence is reinserted into this case, then the expert disclosures and discovery would also include BNSF's duties, and not only what BNSF knew and when, but what the "state of the art" was vis-a-vis the railroad industry and asbestos, as well as what BNSF did in response to that knowledge, and whether BNSF breached any duties, etc. Likewise, the role of and reference to non-parties in the upcoming trials greatly changes the scope of the expert disclosures and discovery. That is why the Asbestos Claims Court stated the cases against BNSF are "effectively stayed across all of these cases because whatever the Supreme Court says is

potential dispositive as to these issues.” **Ex. B** - Asbestos Claims Court Transcript (February 19, 2019), p. 4, lns. 12-16.

That is the precise reason why the undersigned stated the following to BNSF’s counsel when asked whether Plaintiff opposed BNSF’s *Motion for Scheduling Order*:

Hello Anthony,

Thank you for your email. This case, like the Barnes cases, includes a claim against BNSF for strict liability and BNSF has alleged preemption and common carrier defenses thereto. Similarly, BNSF has alleged identical non-party defenses. The Asbestos Claims Court noted the cases against BNSF are effectively stayed because the Montana Supreme Court’s opinion in the Barnes case is potentially dispositive on these issues. As such, we do not believe a scheduling conference with Judge Parker at this time would further interests of judicial economy.

Thank you,
Jinn
Jennifer Jersek Mariman | Attorney

Exhibit I – 4/16/19 Email from Mariman to Nicastro (emphasis added). There is no basis to support BNSF’s representation to this Court that “Plaintiff opposes the setting of a scheduling order because he knows the longer this routine 15-minute hearing is pushed out the longer it will take for this matter to go to trial.” BNSF’s Motion for Scheduling Order, p. 5. Plaintiff is concerned about judicial economy, which is consistent with the stated position of the Asbestos Claims Court, which did not think that was a good use of judicial resources. For these reasons, Plaintiff believes entering a scheduling order at this time is premature and is contrary to the sound policy underlying Judge Eddy’s position.

III. BNSF’s Conferral Accusations.

Plaintiff’s counsel will briefly respond to BNSF’s accusations related to “conferring.” There is no requirement that Plaintiff confer before filing motions in this matter. *See* BNSF’s

Motion for Scheduling Order, p. 3 (quoting language only that it is common practice in federal court and there is a pending UDCR amendment). Nevertheless, BNSF accuses Plaintiffs' counsel of failing to confer with BNSF on its filings with this Court and thereby implying to the Court that Plaintiffs' filings are unopposed.

On March 13, 2019 Plaintiffs filed a *Notice to District Court re: March 21, 2019 Scheduling Conference* ("Notice"). BNSF did not respond. One week later on March 20, 2019, Plaintiffs filed their *Motion to Vacate March 21, 2019 Scheduling Conference* ("Motion") and provided a proposed *Order* for the Court's convenience. Neither the *Notice* nor the *Motion* stated they were unopposed. There was no intent to imply to the Court either were unopposed.² Nor did either pleading state a conferral with BNSF or any other defendant occurred. BNSF does not dispute that no such conferral requirement exists here. BNSF's accusation that the undersigned and the Court engaged in an improper *ex parte* communication by the undersigned's filing of the *Motion* is without merit.

With respect to BNSF's accusations regarding conferrals in other cases, Plaintiff's counsel will not address those cases here. However, Plaintiff's counsel advises the Court that Plaintiff's counsel routinely amends complaints to reflect the death of a Plaintiff, among other reasons. Many of those amendments are as a matter of course under Mont. R. Civ. P. Rule 15(a)(1)(B) because BNSF has not filed a responsive pleading (i.e. "A party may amend its pleading once as a matter of course within...21 days after service of a responsive pleading. . ."). The *Olson v. BNSF et al.* case (which BNSF uses as an example of a failure to confer) is one such case. While it is undisputed there is no requirement to confer prior to filing a motion in this

² The undersigned's practice is to note if a motion is unopposed by including the term "Unopposed" in the pleading title. Based on observations, that appears to be the practice of nearly all practitioners in Montana as well.

case, Plaintiff's counsel respects other judge's preferences and will conduct its motions practice accordingly.

CONCLUSION

For the reasons stated herein as well as those stated by the Asbestos Claims Court in the attached transcripts, Plaintiff respectfully requests the Court deny BNSF's *Motion for Scheduling Order*.

Respectfully submitted this 26th day of April, 2019.

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