

06/29/2021

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: AC 17-0694

Roger M. Sullivan  
Allan M. McGarvey  
John F. Lacey  
Jinnifer Jeresek Mariman  
Ethan Welder  
Dustin A. Leftridge  
McGarvey Law, P.C.  
345 First Avenue East  
Kalispell, MT 59901  
(406) 752-5566

Attorneys for McGarvey Plaintiffs

IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

*Cotter et al. v. BNSF et al.*  
(DV-57-2020-367-AE), J.Cuffe  
*Boswell v. Int'l Paper et al.*  
(DV-57-2011-083-AE), J.Eddy  
*Adamson v. BNSF et al.*  
(DV-57-2018-080-AE), J.Kutzman  
*Benfield et al. v. BNSF et al.*  
(DV-57-2021-005-AE), J.McMahon  
*Almeida et al. v. BNSF et al.*  
(DV-57-2014-919-AE), J.Oldenberg  
*Ball v. BNSF et al.*  
(DV-57-2016-060-AE), J.Parker  
*Carlson v. Maryland Casualty Co. et al.*  
(DV-57-2016-428-AE), J.Levine  
*Applegate v. BNSF et al.*  
(DV-57-2015-183-AE), J.Wilson

MONTANA TWENTY-THIRD  
JUDICIAL DISTRICT COURT

Cause Nos. DV-57-2020-367-AE  
DV-57-2011-083-AE  
DV-57-2018-080-AE  
DV-57-2021-005-AE  
DV-57-2014-919-AE  
DV-57-2016-060-AE  
DV-57-2016-428-AE  
DV-57-2015-183-AE

*In Re Asbestos Litigation*

Cause No. AC 17-0694

**PLAINTIFFS' MOTION FOR  
CASE MANAGEMENT  
OF ACTIVE DOCKET**

COME NOW McGARVEY PLAINTIFFS in the above identified representative cases, and in all other pending asbestos personal injury cases in the Twenty-Third

Judicial District, and move each and all of the judges of the Montana Asbestos Claims Court (“ACC”), to enter an Order for the effective Case Management of all Active Docket cases before the ACC.

This identical motion is filed in all of the above-referenced, representative cases for purposes of adhering all parties before the ACC to, and presenting all ACC Judges with, a uniform case management approach regarding all Active Docket cases before the ACC. This motion is made pursuant to Rules 1 and 16 M.R. Civ. P., pursuant to the inherent power of the ACC and the Twenty-Third Judicial District Court, including each of the individual ACC Judges therein, to control the ACC docket.

### **BACKGROUND**

The ACC was established by the Montana Supreme Court to address “the extraordinary complexity and cost of these cases, and **the enormous detrimental impact on the resources of Montana district courts *if required to litigate these cases on an individual basis.***” Mont. Sup. Ct. Order, 11/28/17, p. 1 (emphasis added). Judge Eddy, in her then-capacity as the only ACC Judge, implemented the Montana Supreme Court’s direction in January 2018 by recognizing the need for “procedures that will facilitate the expeditious, economical and just resolution of these cases.” ACC Order, 1/9/18, p. 1. These procedures included reliance on cases being stayed, consideration of “prioritization of cases based on injury severity,” and the consideration and “[i]dentification of individual test cases,” *id.*, pp. 1-2, with ultimately the Court being in the position of selecting cases for trial. See ACC Order, 2/21/18, p.2 (“The purpose of the parties identifying lead/test cases is for the Court to be able to select cases to set for trial.” The Court expects the

selection of cases identified to encompass a variety of types of Plaintiffs, types of exposure, types of diagnosis, legal issues, and Defendants.”) (emphasis added).

### MOTION

The current need for the ACC (i.e., all of the individual ACC Judges) to implement a uniform case management approach regarding Active Docket cases before the ACC is as great as ever. As demonstrated recently in the context of the Deferred Docket, the potential for “an untenable sideshow that detract[s] the resources of the parties, counsel, and the ACC” is extremely real. ACC Order, 6/9/21, p.1. The explicit premise of the ACC is that these cases *cannot* be litigated on an individual basis. See Mont. Sup. Ct. Order, 11/28/17, p. 1. Vulnerability remains to an avalanche of peripheral (and/or identical) matters that will overwhelm each ACC Judge and the parties, with such indiscriminate litigation preventing the intended “expeditious, economical and just resolution of these cases.” ACC Order, 1/9/18, p. 1.

For example, the *Adamson* case (J. Kutzman) identified in the above caption is one of 17 cases that Defendant BNSF self-selected and unilaterally began litigating in July 2020. Judges in 16 of those 17 cases have never granted BNSF’s motions for scheduling conferences or scheduling orders, yet BNSF has served 84 separate written discovery requests and sought depositions in all the 16 cases absent any showing of good cause or leave from the courts. Substantial litigation and briefing has resulted, with the district courts in 16 of those 17 cases having now been swamped with essentially the same 700-plus pages of repetitive filings, including most recently the motions to compel that BNSF filed on approximately June 17-18, 2021. At present, nothing prevents this unconstrained

effort from being repeated on an individual basis with *all* the 800-plus Active Docket claims.<sup>1</sup> The potential result, of course, is the exact overwhelming of district courts that led the Montana Supreme Court to stay all these cases and to create the ACC in 2017.

Therefore, consistent with the intent of the Montana Supreme Court and the ACC's creation, direction from the ACC over the parties regarding what cases and what matters are appropriate for litigation and the ACC's resources should occur.

Accordingly, Plaintiffs move each and all of the judges of the ACC to Order as follows regarding all Active Docket cases before the ACC:

1. All Active Docket cases are STAYED unless a Scheduling Order has been issued by the Court.
2. Parties are precluded from requesting a Scheduling Order or a Scheduling Conference except upon motion and a showing of case-specific good cause.
3. Courts may enter Scheduling Orders in reliance upon the following basis:
  - (a) Courts may request and parties are obligated to file Joint Status Reports in cases selected by the Courts, as informed by the Master Claims List; and
  - (b) Courts will enter Scheduling Orders in such cases in accordance with a Master Calendar created and maintained by the ACC.
4. A Master Claims List of all Active Docket cases, consistent with what has been previously filed with the ACC, shall be filed by Plaintiffs every six months. It shall be sorted according to each individual ACC Judge.

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<sup>1</sup> Meanwhile, the parties and courts are actively litigating more than ten cases in front of four different ACC judges, who have independently considered and appropriately issued scheduling orders in such cases, without premature intrusion or self-selection by BNSF.

5. Plaintiffs must serve on Defendants the previously-approved ACC Fact Sheets and Releases following the filing of a new case in the ACC.

6. Service of discovery is not permitted unless a Scheduling Order is in place. Parties are permitted to seek discovery in stayed cases if exceptional circumstances exist, such as to require preservation of evidence. A party must meet and confer regarding such potential discovery, and then may approach the Court with discovery needs or concerns only following such good faith conferral.

### CONCLUSION

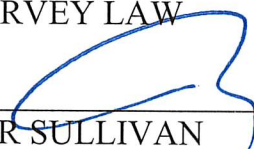
Plaintiffs have discussed this motion with Counsel for the following ACC Defendants and inquired regarding their potential objection:

State of Montana	Maryland Casualty Co. (“MCC”)
BNSF Railway Co. (“BNSF”)	Mine Safety Appliance (“MSA”)
International Paper et al. (“IP”)	Robinson Insulation Co. (“Robinson”)
Stimson Lumber Co. (“Stimson”)	Grogan Robinson Lumber Co. (“Grogan”)

MSA states that it does not oppose Plaintiffs’ Motion; IP, Robinson, Grogan, and the State of Montana state that they take no position regarding Plaintiffs’ Motion at this time. Plaintiffs have not received a formal position from BNSF and MCC at this time.

A proposed order is submitted herewith.

Respectfully submitted this 29th day of June, 2021.

McGARVEY LAW  
By:   
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ROGER SULLIVAN  
ALLAN McGARVEY  
JOHN F. LACEY  
*Attorneys for Plaintiffs*



## CERTIFICATE OF SERVICE

I, John F. Lacey, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 06-29-2021:

Amy Poehling Eddy (Attorney)  
920 South Main  
Kalispell MT 59901  
Representing: Amy Eddy  
Service Method: eService

Roger M. Sullivan (Attorney)  
345 1st Avenue E  
MT  
Kalispell MT 59901  
Representing: Adams, et al  
Service Method: eService

Allan M. McGarvey (Attorney)  
345 1st Avenue East  
Kalispell MT 59901  
Representing: Adams, et al  
Service Method: eService

Ethan Aubrey Welder (Attorney)  
345 1st Avenue East  
Kalispell MT 59901  
Representing: Adams, et al  
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)  
345 First Avenue East  
Montana  
Kalispell MT 59901  
Representing: Adams, et al  
Service Method: eService

Jeffrey R. Kuchel (Attorney)  
Crowley Fleck PLLP  
305 South 4th Street East  
Suite 100

Missoula MT 59801  
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC  
Service Method: eService

Danielle A.R. Coffman (Attorney)  
1667 Whitefish Stage Rd  
Kalispell MT 59901  
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC  
Service Method: eService

Gary M. Zadick (Attorney)  
P.O. Box 1746  
#2 Railroad Square, Suite B  
Great Falls MT 59403  
Representing: Honeywell International  
Service Method: eService

Gerry P. Fagan (Attorney)  
27 North 27th Street, Suite 1900  
P O Box 2559  
Billings MT 59103-2559  
Representing: CNH Industrial America LLC  
Service Method: eService

G. Patrick HagEstad (Attorney)  
2721 Connery Way  
Missoula MT 59808  
Representing: United Conveyor Corporation, Riley Stoker Corporation et al  
Service Method: eService

Jennifer Marie Studebaker (Attorney)  
210 East Capitol Street  
Suite 2200  
Jackson MS 39201  
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al  
Service Method: eService

Joshua Alexander Leggett (Attorney)  
210 East Capitol Street, Suite 2200  
Jackson MS 39201-2375  
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al  
Service Method: eService

Vernon M. McFarland (Attorney)  
210 E. Capitol Street, Suite 2200  
Jackson MS 39201-2375  
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al  
Service Method: eService

Jean Elizabeth Faure (Attorney)  
P.O. Box 2466  
1314 Central Avenue  
Great Falls MT 59403  
Representing: Goulds Pump LLC, Grinnell Corporation, Borg Warner Morse Tec LLC  
Service Method: eService

Jason Trinity Holden (Attorney)  
1314 CENTRAL AVE  
P.O. BOX 2466  
Montana  
GREAT FALLS MT 59403  
Representing: Goulds Pump LLC, Grinnell Corporation, Borg Warner Morse Tec LLC  
Service Method: eService

Chad E. Adams (Attorney)  
PO Box 1697  
Helena MT 59624  
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.  
Service Method: eService

Katie Rose Ranta (Attorney)  
Faure Holden, Attorneys at Law, P.C.  
1314 Central Avenue  
P.O. Box 2466  
GREAT FALLS MT 59403  
Representing: Borg Warner Morse Tec LLC  
Service Method: eService

Stephen Dolan Bell (Attorney)  
Dorsey & Whitney LLP  
125 Bank Street  
Suite 600  
Missoula MT 59802  
Representing: Ford Motor Company  
Service Method: eService

Dan R. Larsen (Attorney)  
Dorsey & Whitney LLP  
111 South Main  
Suite 2100  
Salt Lake City UT 84111  
Representing: Ford Motor Company  
Service Method: eService

Robert J. Phillips (Attorney)  
Garlington, Lohn & Robinson, PLLP

P.O. Box 7909  
Missoula MT 59807  
Representing: BNSF Railway Company  
Service Method: eService

Emma Laughlin Mediak (Attorney)  
Garlington, Lohn & Robinson, PLLP  
P.O. Box 7909  
Missoula MT 59807  
Representing: BNSF Railway Company  
Service Method: eService

Daniel Jordan Auerbach (Attorney)  
201 West Railroad St., Suite 300  
Missoula MT 59802  
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company  
Service Method: eService

Leo Sean Ward (Attorney)  
PO Box 1697  
Helena MT 59624  
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.  
Service Method: eService

Robert M. Murdo (Attorney)  
203 North Ewing  
Helena MT 59601  
Representing: Mine Safety Appliance Company LLC  
Service Method: eService

Murry Warhank (Attorney)  
203 North Ewing Street  
Helena MT 59601  
Representing: Mine Safety Appliance Company LLC  
Service Method: eService

Ben A. Snipes (Attorney)  
Odegaard Kovacich Snipes, PC  
P.O. Box 2325  
Great Falls MT 59403  
Representing: Backen et al, Sue Kukus, et al  
Service Method: eService

Mark M. Kovacich (Attorney)  
Odegaard Kovacich Snipes, PC  
P.O. Box 2325  
Great Falls MT 59403

Representing: Backen et al, Sue Kukus, et al  
Service Method: eService

Ross Thomas Johnson (Attorney)  
Odegaard Kovacich Snipes, PC  
P.O. Box 2325  
Great Falls MT 59403  
Representing: Backen et al, Sue Kukus, et al  
Service Method: eService

Randy J. Cox (Attorney)  
P. O. Box 9199  
Missoula MT 59807  
Representing: A.W. Chesterson Company  
Service Method: eService

Zachary Aaron Franz (Attorney)  
201 W. Main St.  
Suite 300  
Missoula MT 59802  
Representing: A.W. Chesterson Company  
Service Method: eService

Robert J. Sullivan (Attorney)  
PO Box 9199  
Missoula MT 59807  
Representing: Ingersoll-Rand, Co.  
Service Method: eService

Dale R. Cockrell (Attorney)  
145 Commons Loop, Suite 200  
P.O. Box 7370  
Kalispell MT 59904  
Representing: State of Montana  
Service Method: eService

Martin S. King (Attorney)  
321 West Broadway, Suite 300  
P.O. Box 4747  
Missoula MT 59806  
Representing: Foster Wheeler Energy Services, Inc.  
Service Method: eService

Maxon R. Davis (Attorney)  
P.O. Box 2103  
Great Falls MT 59403  
Representing: Continental Casualty Company  
Service Method: eService

Tom L. Lewis (Attorney)  
2715 Park Garden Lane  
Great Falls MT 59404  
Representing: Harold N. Samples  
Service Method: eService

Keith Edward Ekstrom (Attorney)  
601 Carlson Parkway #995  
Minnetonka MN 55305  
Representing: Brent Wetsch  
Service Method: eService

William Rossbach (Attorney)  
401 N. Washington  
P. O. Box 8988  
Missoula MT 59807  
Representing: Michael Letasky  
Service Method: eService

Kennedy C. Ramos (Attorney)  
1717 Pennsylvania Avenue NW  
1200  
wash DC 20006  
Representing: Maryland Casualty Corporation  
Service Method: eService

Edward J. Longosz (Attorney)  
1717 Pennsylvania Avenue NW  
Suite 1200  
Washington DC 20006  
Representing: Maryland Casualty Corporation  
Service Method: eService

Chad M. Knight (Attorney)  
1401 Walnut St  
Suite 200  
Boulder CO 80302  
Representing: BNSF Railway Company  
Service Method: eService

Anthony Michael Nicastro (Attorney)  
27 Shiloh Road, Ste 10  
Billings MT 59106  
Representing: BNSF Railway Company  
Service Method: eService

Nadia Hafeez Patrick (Attorney)  
929 Pearl Street Suite 350  
Boulder CO 80302

Representing: BNSF Railway Company  
Service Method: eService

Kevin A. Twidwell (Attorney)  
1911 South Higgins Ave  
PO Box 9312  
Missoula MT 59807  
Representing: Libby School District #4  
Service Method: eService

Jinnifer Jeresek Mariman (Attorney)  
345 First Avenue East  
Kalispell MT 59901  
Representing: Adams, et al  
Service Method: eService

James E. Roberts (Attorney)  
283 West Front Street  
Suite 203  
Missoula MT 59802  
Representing: BNSF Railway Company  
Service Method: eService

William Adam Duerk (Attorney)  
283 West Front Street  
Suite 203  
Missoula MT 59802  
Representing: BNSF Railway Company  
Service Method: eService

Daniel W. Hileman (Attorney)  
22 Second Ave. W., Suite 4000  
Kalispell MT 59901  
Representing: Maryland Casualty Corporation  
Service Method: eService

Mark S. Williams (Attorney)  
235 East Pine  
PO BOX 9440  
Missoula MT 59807-9440  
Representing: Ace Fire Underwriters Companyh  
Service Method: eService

Timothy B. Strauch (Attorney)  
257 W Front Street, Ste A  
Missoula MT 59802  
Representing: Litigation Abstract, Inc.  
Service Method: eService

Nathan Dale Bilyeu (Attorney)  
203 N Ewing Street  
Helena MT 59601  
Representing: Mine Safety Appliance Company LLC  
Service Method: eService

Dallin Austin Lind (Attorney)  
300 central Ave  
7th Floor  
Great Falls MT 59403  
Representing: Stimson Lumber Company, Zurn Industries, Inc.  
Service Method: eService

Patrick Watt (Attorney)  
Box 2269  
GREAT FALLS MT 59403-2269  
Representing: Stimson Lumber Company, Zurn Industries, Inc.  
Service Method: eService

Heather M. Starnes (Attorney)  
P.O. Box 2269  
Great Falls MT 59403  
Representing: Stimson Lumber Company, Zurn Industries, Inc.  
Service Method: eService

Stephanie A. Hollar (Attorney)  
P.O. Box 2103  
Great Falls MT 59403  
Representing: Robinson Insulation Company  
Service Method: eService

Electronically Signed By: John F. Lacey  
Dated: 06-29-2021