

07/13/2021

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AC 17-0694

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*Attorneys for Defendants BNSF Railway Company and John Swing***IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA**

IN RE ASBESTOS LITIGATION <i>Consolidated Cases</i>	Cause No.: AC-17-0694 BNSF AND JOHN SWING'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CASE MANAGEMENT OF ACTIVE DOCKET <i>Applicable to all Cases</i>
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COME NOW Defendants, BNSF RAILWAY COMPANY ("BNSF") and JOHN SWING ("Swing"), by and through their attorneys of record, Knight Nicastro MacKay, LLC, and hereby submit their Response in Opposition to Plaintiffs' Motion for Case Management of Active Docket as follows:

I. INTRODUCTION

Plaintiffs' *Motion* seeks to stay all active ACC case because responding to discovery, attending depositions and disclosing witnesses, particularly expert witnesses, would be too

burdensome on their lawyers and staff.¹ Specifically, Plaintiffs' *Motion* asks the ACC judges to do four things:

- A. Indefinitely stay the litigation of all active asbestos lawsuits pending before the seven appointed ACC judges – despite the fact that such stays are not authorized under Montana law;
- B. Preclude the setting of a scheduling conference or the issuance of scheduling orders – in direct violation of Rules 1 and 16, M.R.Civ.P, because the Rules of Civil Procedure are self-executing once a lawsuit is filed;
- C. Deny Defendants their constitutional due process rights, which include a right to full discovery and a just and speedy resolution of the lawsuits filed against Defendants – based upon a claim that a plaintiff's counsel lacks resources to litigate the matter to answer discovery and meet mandatory deadlines set by Rule 16.
- D. Suspend the Rules of Civil Procedure because litigating claims would be burdensome on the law firm that filed the claim – an unprecedented request.

Yet, Plaintiffs' *Motion* cites to no case in which a plaintiff was entitled such relief, and ignores that Plaintiffs have already been denied the relief they are seeking in their Motion.

In fact, the Honorable Judge Eddy, acting on behalf of all the ACC judges, has already denied the request made in this *Motion*. Speaking for all ACC judges, Judge Eddy ruled that the active cases would get handled just like any other civil lawsuit:

¹ Notably the OKS firm which represents active asbestos claimants did not join in this motion. That firm has responded to written discovery and deposition requests on active cases with or without scheduling orders.

THE COURT: **We’re** doing that², but **we’re** going to handle the docket just like we handle the rest of the civil docket, which these cases, while being significant to your practices, are actually not numerically significant to **us**, so they’re going to get handled just like all the other civil cases would get.

See **Exhibit A**: *Transcript from ACC Hearing d. 5/17/2021* at pg 53 (**emphasis** added). Despite this clear ruling, Plaintiffs filed this *Motion* again under the General ACC case number (AC-17-0694) in an attempt to undermine Judge Eddy’s prior ruling. Given there is no procedure for a *Motion to Reconsider* under Montana law, and for the other reasons fully enumerated herein, Defendants respectfully request the ACC deny Plaintiffs’ request, again.

II. ADDITIONAL BACKGROUND INFORMATION REGARDING THE ACC

Plaintiffs’ *Motion* relies heavily on language from 2017, when the ACC was first created. Yet, the *Motion* somehow ignores the significant changes that have occurred in the ACC over the last three years. The ACC was created under the premise that **one** judge would facilitate pretrial activities in all assigned ACC cases, and then send each individual case back to the originally assigned judge for trial:

Under that order, it is the task of this Court to manage these consolidated cases on a pretrial basis only, with the cases being referred back to the State District Courts for ultimate trial.

See **Exhibit B**: *ACC Hearing 1.31.2018* at pg. 11.

However, after the list of claimants was dramatically reduced to 835 active cases in 2018, the Montana Supreme Court added more judges to meet the demands of litigation and transferred complete jurisdiction to each judge to handle through settlement or trial. See **Exhibit C**: *Order* d. 12.11.2018. In 2019, the ACC informed the parties that they could ask any judge for a scheduling order on any active cases that had been assigned to an ACC judge.

² This statement referred to the Court keeping track of which cases are set for trial in the form of a master calendar.

See **Exhibit D. ACC Hearing 2.19.2019**. Such a request could be made even if the case involved ones with issues *similar* to the writs of supervisory control that were pending before the Montana Supreme Court – although the Court considered some of those matters stayed until the writs were resolved in 2020.

Ever since the number of claimants was dramatically reduced, and 8 ACC judges were appointed and given complete jurisdiction over the cases, the concept that only one or two cases would be selected for trial was completely abandoned. Judge Eddy has ruled consistently on this issue ever since 2019. Consistent with this ruling BNSF has attempted to conduct discovery on active cases so the parties would be ready for trial settings. The only roadblock that has prevented many of these cases from being ready for trial or dismissed voluntarily has been the law firm representing these plaintiffs, and their refusal to participate in the discovery process.

A. The ACC Already Denied Plaintiffs’ Requests to Micromanage Cases Assigned to Other Judges.

On May 17, 2021, at an ACC hearing, the McGarvey firm argued that conducting discovery and deposing plaintiffs on active cases was too burdensome. The Court reminded counsel that “you filed these cases individually and they are going to be individually litigated.” See **Exhibit A** at pgs. 51-56. The Court then told the parties that hearings covering general ACC issues were going to be nonexistent, and that the individual ACC judges would manage their own docket – meaning that Judge Eddy would not micromanage the other ACC judges’ dockets. The Court said that these cases are “going to get handled just like all the other civil cases would get,” and went on to note that ACC cases for the seven judges are “actually not numerically significant to [the Court]”. *Id.* The Court stated that it will simply get these cases done “just like I get the rest of my civil docket done.” *Id.*

Thus, Judge Eddy has already ruled on behalf of the ACC and denied Plaintiffs' request to stay cases, preclude discovery and micromanage each individual case from a global case management process. The Court informed the parties that the only global initiative that would continue would be that the judges would keep track of when trials are occurring as part of a master trial calendar. Presumably, this process would occur because most of these cases are filed in Cascade County and courtroom space is limited.

By filing this *Motion*, Plaintiffs have either missed, or are willfully ignoring, the clear mandate from the Court – that the parties need to conduct discovery in order to be ready for trial when a courtroom comes available. Given that multiple judges can set any number of cases for trial, Plaintiffs' request that judges only select a handful of cases for the parties to conduct discovery in, from now until 2023, is untenable. In fact, Judge McMahon has already rejected this piecemeal argument, and instead opted to set scheduling orders in all asbestos cases assigned to him. He has not given trial dates but has ordered the parties to conduct discovery and appear at a set final pretrial conference, where he expects the parties to report to the Court that they are ready for a trial date. *See Exhibit E: Affidavit of Anthony M. Nicastro*. The ACC has already decided it would not micromanage individual ACC judges' dockets and asking the individual ACC judges to reconsider that ruling is inappropriate.

B. The Rules of Civil Procedure are self-executing once a lawsuit is filed and Plaintiffs' request to suspend the rules violates the plain language of both Rule 1 and Rule 16.

Plaintiffs attempt to portray an overloaded system with cases in dire need of global case management because the parties and the court system cannot handle the caseload. Plaintiffs argue the court system is swamped with over 700 pages of filings on 16 different cases, on near identical issues. Yet, Plaintiffs fail to inform the Court that BNSF's Motions were filed solely because Plaintiffs refused to comply with the Rules of Civil Procedure and have stonewalled

discovery for *over a year* on these 16 cases. During that entire year only two asbestos cases were set for trial in 2021 against BNSF and MCC.³ Had plaintiffs taken that entire year to simply answer discovery on 16 cases, there would be no pleadings pending before the individual judges other than requests for scheduling orders, made pursuant to Rule 16. These cases do not need global case management and the Court system would spend almost no time on these matters if plaintiffs followed the self-executing Rules of Civil Procedure.

The Rules of Civil Procedure require parties to conduct discovery and get cases ready for trial with little to no court intervention. Unlike other jurisdictions, in Montana, discovery starts the moment a defendant answers a lawsuit. In fact, the rules are written in a way that the parties can and should conduct *considerable* discovery *before* the Court system even holds a pretrial conference. *See generally* Rule 16, M.R.Civ.P. In the cases currently pending before all the ACC judges, Plaintiffs simply refuse to conduct any discovery until a Court orders them to litigate. For example, in *MacDonald vs. BNSF* counsel for BNSF conferred with the McGarvey firm about the parties developing their own scheduling order and expert witness disclosure deadline for this active case. *See Exhibit F: Email from Anthony Nicastro.* McGarvey firm refused. Had they not refused, that case would be ready for trial the moment the Court had a courtroom available.

Plaintiffs' *Motion* purportedly relies only on Rule 1 and Rule 16 of the Montana Rules of Civil Procedure as legal authority for this *Motion*. Yet, the plain language of those rules does not support Plaintiffs' *Motion*. Rule 1, M.R.Civ.P states:

These rules govern the procedure in all civil actions and proceedings in the district courts of the state of Montana...They should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.

³ *Hutt vs. MCC* and *Barnes vs. BNSF*

Despite the directive to move cases in a “just and speedy” manner, Plaintiffs request that nothing, including discovery, should happen on an active lawsuit until the Court sets a trial date – a request that directly contradicts the Rules.

Judge Eddy has already informed the parties that she cannot get a trial date in Cascade County until 2023. If Plaintiffs’ motion were to be granted, the asbestos litigation would last for several decades violating the foundational rule of moving cases in a “speedy” manner. Instead, Rule 1 dictates that the parties shall prepare these cases for trial such that multiple cases are ready when the ACC judges have courtroom time in Cascade County. Responding to discovery, identifying experts and conducting depositions of plaintiffs are inevitable tasks in these individual cases. In fact, in all of these cases the plaintiffs allege that their exposure was distinct and unique in a wide variety of temporally separated, geographically distinct and highly differentiated routes and circumstances. *See Exhibit G: Complaint*. Thus, discovery on the underlying facts of all cases pending before ACC judges will necessarily vary considerably. Per Rule 1, Defendants are entitled to this discovery without delay so the claims and evidence of each case can be identified, evaluated and in many cases preserved, particularly if trial may not occur for several years.

Furthermore, requiring active plaintiffs to answer discovery and eventually retain experts would lead to a speedy determination of many of these cases. As BNSF has previously brought to the Court’s attention, most of these claimants relied on CARD and Dr. Black for a diagnosis of an asbestos related disease. Yet Plaintiffs, through counsel in various ACC hearings and pleadings, have withdrawn CARD and Dr. Black as expert witnesses in these cases. For example, in *Jason MacDonald vs. BNSF*, BNSF filed a *Motion for Summary Judgment* based on Plaintiff’s failure to have expert witness testimony diagnosing him with an asbestos related disease. In *Response*, Plaintiff MacDonald did not argue Dr. Black satisfied

this requirement. Instead, he argued that his claim, which is an active case, lacked substantial damages and the Court should dismiss it as part of a case registry motion – which was later denied by the ACC. See **Exhibit H: BNSF’s Motion for Summary Judgment and Plaintiff’s Response in Opposition**. MacDonald’s abandonment of CARD and Dr. Black to substantiate the evidentiary support for his claim is not surprising. McGarvey Plaintiffs have dismissed many other active cases because they were pressed by deadlines set by the Courts, and the plaintiff ultimately had to admit their claim lacked evidentiary support or they no longer wished to pursue the claim.⁴

Plaintiffs’ *Motion* would also violate the plain language of Rule 16, M.R.Civ.P, which states the “judge **must** issue [a] scheduling order as soon as practicable, but in any event within 90 days of a request by a party.” (**emphasis added**). The scheduling order “must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.” *Id.* Plaintiffs’ *Motion* asks the Court to rewrite the Rules of Civil Procedure and change a mandatory requirement into one that requires a defendant to prove why a lawsuit should not sit indefinitely in inactive status for years or even decades.⁵

Rule 16(a) offers additional guidance for why Plaintiffs’ *Motion* is contrary to the Rules of Civil Procedure. This subsection instructs Courts to order pretrial conferences for the purposes of expediting disposition of the action; establishing early control so the case will not be protracted because of lack of management; discouraging wasteful pretrial activities; improving the quality of trial through more thorough preparation and the facilitating of possible

⁴ See *Watson vs. BNSF*, ADV-10-740, *Kampf vs. BNSF*, CDV-16-0424, *Eleanore Allen and George Shattuck vs. BNSF et al.*, DV-57-2002-459-AE, *Sally Anderson v. BNSF*, DV-57-2015-474-AE.

⁵ Plaintiffs’ *Motion* does not articulate how cases would be selected for scheduling orders. It simply states that the Court would refer to master claims lists served every six months.

settlements. *Id.* None of those factors are met if Plaintiffs' indefinite stay and prohibition on discovery were to be ordered. As demonstrated by the fact that many cases are being voluntarily dismissed once scheduling orders are signed, the five factors in Rule 16(a) are better achieved by denying Plaintiffs' Motion and allowing these cases to follow the normal process outlined by the Rules of Civil Procedure.

C. Plaintiffs Request for an Indefinite Stay of Cases violates Montana Law and Fails to Establish a Clear Case of Hardship or Inequity.

Montana law does not authorize indefinite stays. In *Lamb v. Dist. Ct. of the Fourth Judicial Dist. of Mont.*, 2010 MT 141, 356 Mont. 534, the Court reversed a trial court's stay that prevented a party from conducting discovery into a bad faith claim while a portion of the underlying workers' compensation claims remained active. *Id.* at *18-19. The party requesting the stay argued the discovery might be prejudicial to the defense of the underlying claim. The Court rejected the argument for two reasons. *Id.* First it found the stay on discovery was improper because it was for a conceivable indefinite period of time. *Id.* Second, the Court took issue with a stay that prevented a party from seeking discovery on an active claim. While the proponent of the stay claimed prejudice in conducting the discovery the Court ruled that prejudice, if it existed, should be addressed in ways that do not completely forbid a party from discovery. *Id.*

In this *Motion*, Plaintiffs are asking that they not have to:

- a. Disclose witnesses who would support or potentially refute their exposure claims;
- b. List all the medical providers they have treated with during their lifetime;
- c. State whether they lived or worked around or used materials that contained asbestos;

- d. List all the damages they are claiming in their lawsuit and the documents or witnesses to support those claims;
- e. Provide the names of medical providers who would testify that they have an asbestos related disease, particularly doctors not affiliated with CARD;
- f. Give the status and documents associated with their claim with the W.R. Grace Trust which ACC Judge McMahon ordered Plaintiffs to produce in cases pending before his Court.
- g. State how they claim in their own words how they were exposed to asbestos.

As an alternative, Plaintiffs offer one-page fact sheets that contain none of the valuable information that Defendants are entitled to. While Plaintiffs have offered to sign blank medical authorizations, they have limited value without Plaintiffs answers to discovery regarding medical treatment. Finally, neither the fact sheets nor the medical releases would prevent the loss of additional relevant and discoverable information that is learned from taking a plaintiff's deposition or deposing witnesses to plaintiff's claims.⁶

In the rare situations where a stay is granted, the proponent must show a "clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Henry v. Dist. Ct. of the Seventeenth Judicial Dist.*, 198 Mont. 8, 645 P.2d 1350 (1982). Here, several "possibilities of damage" to defendants exist if the Court were to grant Plaintiff's proposal. By refusing to

⁶ Plaintiffs motion advocates that depositions occur in exceptional circumstances such as preserving evidence. However, Plaintiffs have never informed Defendants that any of their clients have had significant changes in their health to put Defendants on notice to request an immediate deposition. Instead defendants only learn that an active claimant has died when plaintiffs move to amend the complaint or tender a revised master claims list at the end of the year.

participate in discovery, each plaintiff is purposefully damaging defendants by withholding information relevant to (1) whether a disease is supported by medical evidence and testimony, (2) proving or disproving Plaintiffs' exposure to asbestos, (3) causation, (4) damages, or (4) the discovery of other parties who may have exposed the plaintiff to asbestos. The withholding of any of these categories information is damaging to the defense of these claims. When everything is being withheld in the aggregate, as it is here, the damage violates Defendants' due process rights. Yet, Plaintiffs *Motion* cites to no legal authority in which a plaintiff was entitled to a stay that deprived a defendant of its due process rights because being required to go forward with a lawsuit taxed the resources of plaintiff's counsel law firm.

The volume of claims, even in a mass tort action does not diminish the standard of care set by the Rules of Civil Procedure. *In re Engle Cases*, 767 F.3d 1082, 2014 U.S. App. LEXIS 17450 (11th Cir. 2014). If counsel lacks resources to fulfill obligations to clients and the court, counsel should enlist the services of another firm or pare down the volume of claims to something manageable. *Id.* at 1114. The *Engle* opinion is a glimpse into the future if the Courts were to grant plaintiffs' motion. *Engle* involved mass tort litigation against tobacco companies. It started when the law firm that brought the cases "didn't have the time or resources required to fully investigate all the complaints." *Id.* at 1086. Multiple lawsuits were filed by the same individuals, counsel lost contact with client, claims were filed long after the statute of limitations had passed, and claims were filed by individuals who did not want to pursue claims. *Id.* Those were just a few examples of the issues that plagued *Engle* – issues that affect the present litigation.

The plaintiffs in *Engle*, just like the Plaintiffs in the present action, suggested the court stay all the pending cases, leaving only a small number of cases active. Later it was discovered that the inaction led to all of the issues outlined above, in hundreds of cases. Plaintiffs blamed

the inattentiveness in part to the stay. The Court rejected this suggestion finding that it was the lack of attention to the Rules of Civil Procedure. Plaintiffs in *Engle* “explained that these problems were the result of the unique logistical difficulties involved in managing so many individual lawsuits.” *Id.* 1087. The Court rejected that explanation. It reminded counsel that the lawyer’s responsibilities “to the court are not diluted even by an ocean of claims.” *Id.* The rules of civil procedure do not apply different when tort litigation becomes mass tort litigation. Accepting this premise would only encourage more filings so counsel can seek exceptions to the rules by pointing merely to the volume of cases. *Id.* at 1114. Instead, counsel should have enlisted the help of another firm or pared down the volume of claims to something that counsel can manage. *Id.* at 1115. The same is true in the present case.

Granting Plaintiffs’ *Motion* invites the same issues that were uncovered in *Engle*, years after a stay was ordered and focus was put on only one or two cases at a time. Foreseeing these issues, Judge Eddy has already denied this motion and explained to the parties that multiple trial settings will be used. However, discovery, depositions and expert disclosures for these cases must occur in order for the parties to meet the desire of the Court system, and the Rules imposed in all civil cases in Montana. The parties do not need a consolidated case management order. They are fully capable of litigating these cases consistent with the Rules of Civil Procedure and doing so in a way that does not overload the Court system. Since this is the second time Plaintiffs have filed a motion seeking a delay to discovery on active cases, a written order denying Plaintiffs Motion is necessary.

CONCLUSION

WHEREFORE, BNSF and John Swing respectfully request the Court to Deny Plaintiffs’ Motion and instruct the parties to:

1. Conduct discovery in accordance with the Rules of Civil Procedure on any active case;
2. Confer in good faith to find agreeable deadlines contemplated by the Court's routine scheduling orders pursuant to Rule 16;
3. If the parties are unable to agree on a scheduling order, then the Court will set one pursuant to the requirements of Rule 16 if a request is made by any party.

DATED this 13th day of July, 2021.

KNIGHT NICASTRO MACKAY, LLC

By: /s/ Anthony M. Nicastro

Chad M. Knight

Anthony M. Nicastro

Jim Roberts

Nadia Patrick

Steven T. Williams

Attorneys for Defendants

BNSF Railway Company and John Swing

EXHIBIT A

1 three status conferences she issued orders staying
2 those three cases pending the ACC's resolutions of
3 our combined Motion For Protective Order in those
4 17 cases.

5 BNSF did not file notice of supplemental
6 authorities for those three orders staying cases
7 with the 14 other judges. Plaintiffs frankly
8 didn't either because we didn't think it was proper
9 to be litigating there and we thought we had a
10 motion fully briefed before this Court and the
11 resolution to come from this Court.

12 Then in one of 17 cases it was reassigned
13 from Judge Best to Judge McMahon. He then entered
14 an order that he'd assumed jurisdiction and
15 requested a stipulated scheduling order from the
16 parties, and because he had done so he had
17 requested the Plaintiffs to respond to BNSF's
18 Request For Admission.

19 Not surprisingly, BNSF filed a Notice of
20 Supplemental Authority with the 16 other cases of
21 Judge McMahon's order including the three cases
22 presently stayed by Judge Levine.

23 THE COURT: Ms. Mariman, I can tell
24 you I'm well aware of the procedural backgrounds of
25 these cases, and I'll resolve it, but counsel's on

1 notice, you filed these cases individually and they
2 are going to be individually litigated if they
3 don't get settled.

4 So the judges are mindful of that, we
5 don't need cross-motions filed in everything. I
6 recognize, you know, I haven't been ruling on these
7 motions -- on purpose to see what would happen, and
8 I recognize it's creating some duplicate filings in
9 cases. We're all aware, we all communicate, we all
10 know exactly what's going on on the cases that we
11 are sitting on. We have a case set for trial in
12 front of me, I believe it's against MCC in --
13 March?

14 MS. MARIMAN: It's MCC, yes.

15 THE COURT: Yes. So, you know, that's
16 what's going to happen.

17 But my expectation is that these hearings
18 with me sitting on case-wide issues are going to
19 become nonexistent because I don't have the time
20 and resources. That was the whole point of getting
21 the other judges involved, so they could manage
22 their own docket, they don't need me micromanaging
23 their dockets for them.

24 And so, yeah, we are at a crossroads with
25 the ACC, but part of that is me phasing out of this

1 work. And the deferred docket is probably going to
2 be the last significant thing I do for the ACC, and
3 then we'll just start litigating cases
4 individually.

5 MS. MARIMAN: Your Honor, to follow up
6 on that, you made mention at our last hearing about
7 having a master calendar, and I'm not entirely
8 certain what the Court is considering in that
9 regard, but we wholeheartedly agree that there
10 should be some overall understanding of what cases
11 are being scheduled and --

12 THE COURT: We're doing that, but
13 we're going to handle the docket just like we
14 handle the rest of the civil docket, which these
15 cases, while being significant to your practices,
16 are actually not numerically significant to us, so
17 they're going to get handled just like all the
18 other civil cases would get.

19 I have 30 of these cases, as far as I can
20 tell I think four should be set for trial, the rest
21 are supposed to be dismissed because there's been
22 settlements; there's not that many against BNSF. I
23 can set those four cases for trial in the next
24 year, and my part of the ACC jurisdiction is going
25 to be done; that's how we're going to be handling

1 that.

2 You're going to be litigating those cases
3 in Cascade County for as long as it takes the
4 Cascade County judge to get through those case.
5 That's just a docket management that I'm not going
6 to resolve for them. We are keeping track of when
7 cases are set for trial --

8 MS. MARIMAN: And Your Honor --

9 THE COURT: -- but we can't say we're
10 going to set cases for trial only in these months,
11 only in these weeks, that's not going to happen,
12 it's too busy, with not enough courtroom space, not
13 enough judges.

14 MS. MARIMAN: I understand, Your
15 Honor. Having some -- and I understand there's --
16 based on what you're telling us that there is
17 communications between and among judges as to when
18 and what is being set. The -- obviously when
19 scheduling orders are issued and cases are set for
20 trial -- for example, in front of Judge McMahon we
21 have -- he has entered I think five scheduling
22 orders, we're now looking at setting a stipulated
23 scheduling order with him involving a sixth case,
24 the one that he has -- was reassigned from Judge
25 Best to him.

1 And trying to get a stipulated scheduling
2 order in front of him, Your Honor, BNSF was not --
3 we already had five trials set, they wanted to go
4 to the front of the line -- which is fine,
5 obviously Judge McMahon will sort it out.

6 But, you know, obviously, Your Honor, you
7 and your Asbestos Claims Court will have set cases
8 for trial as well.

9 Judge Cuffe hopefully will set these lead
10 cases for trial over in Libby. We're hopeful that
11 that will happen -- the thought of trying --

12 THE COURT: This is not -- once these
13 other judges have jurisdiction I'm not going to
14 tell them when to try their cases, I'm not going to
15 tell them how to set the scheduling orders, and I'm
16 not going to tell them when to do it.

17 You know, speaking for myself we've got
18 one set in March, I think I have a handful of other
19 ones that need to be set. I will tell you I will
20 stack all of them for the same week and we'll try
21 whatever one we try. The witnesses are going to be
22 the same as far as I can tell across most of the
23 cases, and we'll get them done just like I get the
24 rest of my civil docket done.

25 But there's too much work to do. You

1 know, we set six or seven lead cases for trial,
2 most of them settled, then we had a significant
3 period of appeal time that I wasn't anticipating,
4 and then we -- I mean it was longer than I had
5 anticipated, I anticipated the appeal, and then we
6 had COVID. So you have massive delays that are
7 going to be associated with the Court's docket that
8 has nothing to do with these cases.

9 Cascade County, I can't get a trial date
10 in their courtroom until the middle of 2023.

11 MS. MARIMAN: Understood, Your Honor.

12 THE COURT: All right.

13 MS. MARIMAN: So, Your Honor, with
14 that, and with respect to your -- oh, one other
15 issue regarding the declarations. There was a
16 statement that an attorney declaration is not
17 valid, it should not be considered as prima facie
18 evidence before the Court when considering
19 dismissal despite it being sworn and allowed by
20 Montana law.

21 There was a representation about Ms.
22 Margaret Conan and that there was an attorney
23 declaration but she hadn't gotten any exam. If you
24 look at the Master Claims List filed on December
25 23rd, 2020, her annual exam was at the Great Falls

EXHIBIT B

1 Pending actual funding of the Asbestos
2 Claims Court by the 2019 Legislature, my authority
3 and jurisdiction arises from an order appointing
4 and creating the Asbestos Claims Court and
5 consolidating cases from November 28, 2017 to the
6 Supreme Court. Under that order, it is the task
7 of this Court to manage these consolidated cases
8 on a pretrial basis only, with the cases being
9 referred back to the State District Courts for
10 ultimate trial.

11 However, I will preside only on those
12 cases, and I quote from the statute, "requesting
13 monetary damages for personal injury, wrongful
14 death, loss of consortium or other injury arising
15 out of asbestos related disease that is alleged to
16 result from the mining of vermiculite, the
17 processing of vermiculite, or the transfer,
18 storage, installation, or removal of a product
19 containing vermiculite." That's the scope of
20 jurisdiction set by the Montana Legislature, and
21 to which I'm bound.

22 As such, actions seeking determination
23 of the existence or extent of insurance coverage
24 for these types of claims is outside the purview
25 of this Court. Likewise asbestos related disease

EXHIBIT C

FILED

12/11/2018

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AC 17-0694

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,

Consolidated Cases.

Cause No. AC 17-0694

ORDER APPOINTING ADDITIONAL
ASBESTOS CLAIMS COURT JUDGES

In the aftermath of the W.R. Grace federal bankruptcy proceedings, the Court Administrator for the State of Montana Judicial Branch has identified at least 540 pending asbestos claim cases in the district courts. Considering that and other circumstances, this Court has determined there exists sufficient need to implement the provisions of the Asbestos Claims Court Act codified at §§ 3-20-101 through -105, MCA, and on November 28, 2017, appointed District Court Judge Amy Eddy as the Asbestos Claims Court Judge for purposes of pretrial proceedings only.

There are currently 2,229 claimants before the Asbestos Claims Court with claims pending against more than 40 individual defendants alleging exposure to asbestos in Libby, Montana. The parties anticipate an additional 200 cases being filed each year moving forward for the foreseeable future. Of these claimants, 1,394 have been moved onto a Deferred Docket. The Deferred Docket is for claimants who have an asbestos-related disease (ARD) diagnosis, generally obtained through a mass screening, but do not have functional symptoms of sickness at this point in time. Once established medical criteria is met, these claimants will move onto the Active Docket for their claims to be resolved.

There are currently 835 claimants on the Active Docket with cases pending in multiple district courts. Of the individual causes of action, they are divided by county as follows: Cascade (85%), Lincoln (8%), Lewis and Clark (6%), Flathead (<1%), Yellowstone (<1%).

In order to more equitably and efficiently meet the demands of this litigation, and in compliance with the Asbestos Claims Court Act, the following district court judges are appointed as additional Asbestos Claims Court Judges:

FILED

DEC 11 2018

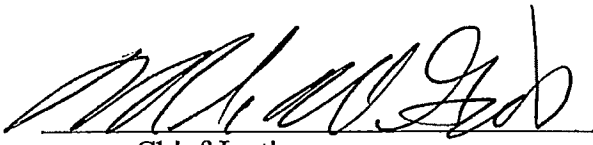
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

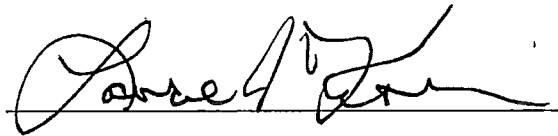
- (1) Judge Matthew Cuffe;
- (2) Judge Michael McMahon;
- (3) Judge Jon Oldenburg;
- (4) Judge John Parker;
- (5) Judge Gregory Pinski; and
- (6) Judge Dan Wilson

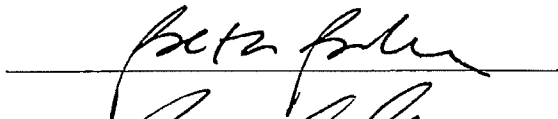
These cases pending before the Asbestos Claims Court shall be divided amongst the Asbestos Claims Court Judges, who shall preside over the matters from commencement of the action through settlement or trial.

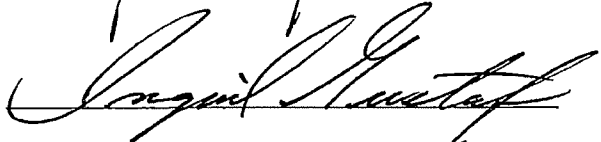
The Clerk is directed to provide copies of this Order to District Court Judges Amy Eddy, Matthew Cuffe, Michael McMahon, Jon Oldenburg, John Parker, Gregory Pinski, and Dan Wilson, and the Clerks of Court in the First, Eighth, Tenth, Eleventh, Thirteenth and Nineteenth Judicial Districts.

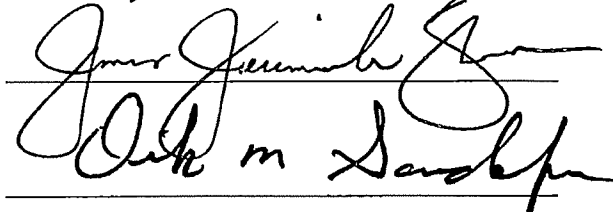
DATED this 11th day of December, 2018.


Chief Justice










Justices

EXHIBIT D

1 IN THE SUPREME COURT OF THE STATE OF MONTANA

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5 IN RE ASBESTUS LITIGATION,)

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A P P E A R A N C E S

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2
3
4 ALLAN McGARVEY, Esq., of the law firm of McGarvey,
Heberling, Sullivan & Lacey, P.C., 345 First Avenue
5 East, Kalispell, Montana 59901,
6 appearing on behalf of Libby Plaintiffs.

7
8 ROSS T. JOHNSON, Esq., of the law firm of Kovacich
Snipes, P.C., 723 Third Avenue North, Great Falls,
9 Montana 59401,
10 appearing by on behalf of Libby
Plaintiffs.

11 VERNON M. McFARLAND, Esq., of the law firm of
Forman Watkins & Krutz LLP, 210 East Capital
12 Street, Suite 2200, Jackson, Mississippi
39201-2375,
13 appearing on behalf of International Paper.

14
15 EDWARD J. LONGOSZ, II, Esq., of the law firm of
Eckert Seamans, 1717 Pennsylvania Avenue NW, 12th
16 Floor, Washington, D.C. 20006,
17 appearing on behalf of Maryland Casualty.
18
19
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FEBRUARY, 19, 2019

1
2 THE COURT: Good morning everyone.
3 We're here In Re the Asbestos Litigation, AC
4 17-0694. We're having an FTR recording of these
5 proceedings so I'm enforcing the podium rule, if
6 you're talking you have to be up at the podium so
7 that Mr. Sapp has a chance of accurately
8 transcribing these proceedings should anyone need
9 it.

10 The first matter before the Court, of
11 course, the Hutt versus Maryland Casualty Company
12 and the Barnes versus BNSF cases have been stayed
13 pending resolution by the Montana Supreme Court
14 of -- I believe it's the three Writs of Supervisory
15 Control. So in my mind -- I don't know if there
16 are any other active, so to speak, cases against
17 Maryland Casualty. I thought that Hutt was the
18 only one, but that being said, we're getting new
19 cases filed all the time and I'm not reviewing them
20 as they're being filed.

21 So that still accurate, Mr. McGarvey?

22 MR. MCGARVEY: That is accurate, Your
23 Honor, that we are continuing to file cases and to
24 get service accepted. There are -- there is the
25 bankruptcy issue of -- with respect to nonworker

1 claims.

2 THE COURT: All right. Are there any
3 other worker claims other than Mr. Hutt's?

4 MR. MCGARVEY: There are other worker
5 claims that are filed that could precede it --

6 THE COURT: Okay.

7 MR. MCGARVEY: -- but they would be
8 subject to what the Supreme Court is going to have
9 to say about what the issues are.

10 THE COURT: All right, thank you.

11 And then with that the same, obviously,
12 with Barnes. My inclination on this is that the
13 cases against Maryland Casualty and BNSF are
14 effectively stayed across all of these cases
15 because whatever the Supreme Court says is
16 potential dispositive as to these issues. However,
17 it's my understanding that Mr. Kovacich,
18 Mr. Snipes, and Mr. Johnson, and perhaps Mr. Knight
19 have requested Judge Pinski to set a scheduling
20 order in a case against BNSF. I don't have the
21 Kovacich Snipes cases on my Master Claims List.

22 So with that, Mr. Johnson?

23 MR. JOHNSON: Good morning, Your
24 Honor --

25 THE COURT: Peeler?

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

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

22 So Coyle came up in front of Judge Pinski
23 during that scheduling conference. At that
24 scheduling conference it was agreed that Coyle
25 would be scheduled for trial this fall. But again,

1 it's our position that that case is in the ACC
2 because he's a railroad employee who was exposed to
3 asbestos while working in and around Libby.

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

8 MR. JOHNSON: Is the Barnes case a --

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

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

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

18 MR. JOHNSON: Okay.

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

1 a case to be set, by all means.

2 MR. JOHNSON: Okay. Thank you, Your
3 Honor.

4 THE COURT: All right. So with that,
5 then, we have pending cases which I believe are
6 just against International Paper, and maybe against
7 the State -- that I believe has settled most of its
8 cases. So with that, my recollection is that the
9 Kovacich Snipes firm has settled its cases against
10 International Paper, but the McGarvey Law Firm has
11 not. So I picked Boswell and Azure as two
12 potential cases to proceed against International
13 Paper where they're represented by the McGarvey law
14 firm. So with that, the Boswell case is a Cascade
15 County case, it's set for September 23rd. That
16 will be at the Federal Courthouse in Great Falls.
17 And notice of reassignment of that case to me was
18 filed on February 8th.

19 So with that, then, we'll have a final
20 pretrial conference -- how much time do you want
21 before the -- two weeks before trial starts?
22 Counsel? Mr. McGarvey, does it matter to you?

23 MR. MCGARVEY: Two weeks is fine.

24 THE COURT: Mr. Longosz?

25 MR. LONGOSZ: Two weeks is fine, Your

1 Honor.

2 THE COURT: Two weeks? All right. So
3 September 23rd -- okay, it will be set on September
4 9th, pretrial conference 9-9 at 8:30 a.m. All
5 right. That will give you a June 21st motion for
6 summary judgment deadline, July 5th all other
7 motions.

8 Now, after that I don't really mind what
9 deadlines you guys want to choose as far as
10 disclosing your experts and closing discovery, so I
11 don't know how much time you need tagging it to
12 that June 21st summary judgment deadline. Anyone?

13 MR. MCGARVEY: Do you want us to
14 choose those dates and propose an order, or would
15 you like to get it done now, Your Honor?

16 THE COURT: I'd like to get it done
17 now, and then I'll just issue the scheduling order
18 setting the deadlines.

19 Do you want to close -- excuse me,
20 disclose experts let's say the beginning of May,
21 and then close discovery maybe May 31st, which
22 gives you three weeks before you file motions for
23 summary judgment?

24 MR. MCGARVEY: So, Your Honor, counsel
25 for IP -- I've spoken with them about the Boswell

1 case, and one of the things that we're trying to
2 sort out is what that case looks like after it's
3 cleaned up with respect to a couple matters.
4 Several of the Plaintiffs are on the Deferred
5 Docket -- or at least one of them is --

6 THE COURT: Okay.

7 MR. MCGARVEY: -- I believe three
8 others have already been settled and just need to
9 be dismissed out, and I think that leaves us two
10 Claimants. And it appears, although we haven't
11 confirmed from both counsels' point of view, that
12 those are workplace exposure cases and potentially
13 can be resolved as OD claims, so we -- depending on
14 how both sides, after confirming the facts, are
15 able to frame, or clean up the case, that would
16 guide us as to which kind of experts are necessary.

17 But I think that the dates that Your Honor
18 has suggested would work in any event.

19 THE COURT: Counsel, do you agree?

20 MR. LONGOSZ: Yes, Your Honor.

21 THE COURT: All right. I'm not doing
22 a very good job at enforcing the podium rule. Why
23 don't we say, then, the deadline to amend pleadings
24 enjoin parties will be March 8th. And then that
25 will give plenty of time -- we'll have simultaneous

1 disclosure of experts on May 3rd, discovery will
2 close May 31st, June 21st motions for summary
3 judgment, July 5th all other motions, final
4 pretrial conference September 9th, and then the
5 jury trial to begin September 23rd.

6 If these claims are bifurcated -- because
7 I don't know who's left or who settled -- they'll
8 be stacked for trial that same week, all right?

9 Okay. Anything else on Boswell?

10 MR. MCGARVEY: Yes, Your Honor. With
11 respect to "stacked", that means if the cases are
12 bifurcated how they will be stacked will be a
13 function of however the cases are -- might be
14 bifurcated?

15 THE COURT: Correct.

16 MR. MCGARVEY: Okay.

17 THE COURT: And I'm not saying they we
18 will be, I'm just -- we'll do it the same as we did
19 in the Barnes case.

20 MR. MCGARVEY: Did you set a date for
21 rebuttal experts?

22 THE COURT: I'm not going to.

23 MR. MCGARVEY: Okay.

24 THE COURT: I don't think it's
25 required by the rules, and it's creating too many

1 issues for me.

2 MR. MCGARVEY: Okay. Thank you, Your
3 Honor.

4 THE COURT: That's what I get for
5 being fancy sometimes; so there's not going to be
6 a deadline for rebuttals.

7 All right. And just as a heads-up, this
8 is going to be kind of tricky and you're going to
9 need to be a little bit flexible because we're
10 pulling a Cascade County jury from the Cascade
11 County Clerk of Court who will be pulling the
12 panel, getting the jury questionnaires, all of
13 that, but the federal -- excuse me, the trial will
14 be staffed by the federal clerks of court and court
15 reporters. So just know that we're going to need
16 to be a little bit flexible as far as communication
17 when we pull the jury because this exact thing
18 hasn't quite been done before.

19 All right then. Let's move on to the
20 Azure matter, which is here in Flathead County.
21 And so this says 30 Claimants. Are they --

22 You can address this, Mr. McGarvey, are
23 they still all involved? Is it the same status?

24 MR. MCGARVEY: Actually, Your Honor,
25 there are 75 Claimants. I think the Court might

1 have seen the first page of the exhibit, there's
2 actually 75 Claimants.

3 THE COURT: Okay.

4 MR. McGARVEY: The great majority of
5 these are on the deferred docket --

6 THE COURT: Okay.

7 MR. McGARVEY: -- which brings us down
8 to about 16 Claimants. It appears that a couple of
9 those might be dismissed. And then I conferred
10 with International Paper's counsel about how the
11 case will look at that point, and it appears that
12 it would be actually a good test case for the
13 product liability issues, the exposures with the --
14 of the -- some of the alleged exposures are to the
15 International Paper products -- or the Grace
16 products sold at the lumber mill store --

17 THE COURT: Okay.

18 MR. McGARVEY: -- so it looks like a
19 good case to frame up some of the issues attendant
20 to that issue, recognizing that perhaps after those
21 common issues are resolved there might be some need
22 to perhaps bifurcate such issues. And if there's
23 going to be stacking, I don't think we can do 16
24 cases in a row.

25 THE COURT: Well, I don't know that

1 they all need to be bifurcated, but they will all
2 be stacked.

3 All right. And just so you're aware,
4 that's my normal jury term here in Flathead County,
5 all right?

6 Okay. Anything else on Azure?

7 I'll enforce the podium rule now. Come on
8 up.

9 MR. MCGARVEY: So for purposes of
10 scheduling order I think that we ought to have some
11 kind of procedure for amendment of the pleadings
12 because we do anticipate that if this is frameable
13 as a pure product liability action -- and I think
14 it is -- we would be dismissing the other claims
15 and just do the strict product liability theory.

16 THE COURT: All right. Good morning.

17 MR. MCFARLAND: Good morning, Your
18 Honor. Vernon McFarland for International Paper
19 Company.

20 Just a couple of issues. First, Azure was
21 originally filed in Cascade County, so they are two
22 claims, and we talked with Plaintiffs' counsel this
23 morning kind of about cleaning that up. So there
24 are four inactive Plaintiffs in that matter,
25 they're all on the Deferred Docket, so however the

1 Court would like us to proceed in that realm. But
2 those four people are also pending in the other
3 Azure matter pending in your court in Flathead
4 County, so they are dual filings that we probably
5 need to clean the docket up in that aspect.

6 THE COURT: All right.

7 MR. McFARLAND: Also, we haven't been
8 served with the Flathead County case yet, so we
9 would like to file an answer and response to the
10 matter, but we haven't actually been served with it
11 yet.

12 THE COURT: All right.

13 Mr. McGarvey, is it any problem to get the
14 Defendant served in these cases in a timely manner
15 so they can respond?

16 MR. MCGARVEY: No, we'll try to get
17 them served yet this week, Your Honor.

18 THE COURT: All right, great. So then
19 with that, let's do a -- the pretrial conferences
20 will be November 6th at 9 a.m. Motion for summary
21 judgment deadline will be August 9th. August 23rd
22 for all other motions. So with that, then, if we
23 pick some more dates, we can disclose experts maybe
24 July -- June 28th and close discovery July 19th;
25 does that make sense?

1 MR. MCGARVEY: Yes, Your Honor.

2 MR. MCFARLAND: Yes, Your Honor.

3 THE COURT: So experts 7-28, close
4 discovery -- excuse me, June 28th, close discovery
5 July 19th. And then let's get amended pleadings
6 filed --

7 Mr. McGarvey, is it your intention to --
8 tell me what the status of Cascade County case is.

9 MR. MCGARVEY: Well, I have an
10 incomplete understanding, Your Honor, but there is
11 some overlapping. I believe that the cases filed
12 in Cascade County that have overlapping cases are
13 against or include other defendants, so our -- I
14 think that the best way for us to clean that up is
15 to the extent that IP is a Defendant in the other
16 action, we would dismiss them from that action.

17 THE COURT: All right. Okay. I'll
18 issue these orders in both of these cases.

19 Now, you should know that we kind of ran
20 into this in the Hutt and Barnes matter that with
21 you guys extending deadlines and requesting oral
22 argument late I did get my orders out in about a
23 week but they were still right up against the final
24 pretrial conference deadline. I will not grant any
25 briefing extensions if you're filing up against the

1 deadlines, there's simply not enough time to get
2 the work done that needs to get done on the cases.
3 And as I'm fond of telling you, you don't have to
4 wait for the deadline to file motions for summary
5 judgment and any other motion.

6 Okay. Anything else?

7 MR. MCGARVEY: No, Your Honor.

8 THE COURT: Okay. So in the Azure
9 case all of those proceedings of course will be
10 held here in Flathead County. In the Boswell
11 matter -- as I'm at least calling it for right now,
12 we'll do everything here unless there are
13 evidentiary issues or witnesses need to be called
14 in Cascade County then we'll make room in Cascade
15 County, I'm unclear at this point where.

16 All right. Anything else? Okay.

17 As far as reassigning all of these cases
18 to the District Court judges, we're just waiting
19 for the software to be updated to do that, and it's
20 just taking a little longer than we had anticipated
21 with the legislative session, so that should occur
22 in the next month, hopefully.

23 All right. Okay. Thank you.

24 (Whereupon, the proceedings were
25 concluded.)

C E R T I F I C A T E

STATE OF MONTANA)
) : ss.
County of Flathead)

I, Tom Sapp, Official Court Reporter for
the State of Montana, residing in Kalispell,
Montana, do hereby certify:

That I transcribed the audio recorded
proceedings in this matter to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand on this the 8th day of March, 2019.

/s/ Tom Sapp

Tom Sapp, Official Court Reporter
Eleventh Judicial District Court
State of Montana
Residing in Kalispell, Montana

EXHIBIT E

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Jim Roberts
Nadia Patrick
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Attorneys for Defendants BNSF Railway Company and John Swing

IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION	Cause No.: AC-17-0694
<i>Consolidated Cases</i>	
	<i>Applicable to all Cases</i>

STATE OF MONTANA)
 :SS
COUNTY OF YELLOWSTONE)

I, Anthony M. Nicastro, being first duly sworn upon oath and over the age of 18 years, hereby deposes and states as follows:

Affiant is an attorney practicing law in Billings, Montana, at Knight Nicastro MacKay, LLC. Affiant represents BNSF Railway Company in the above-entitled matters.

1. During oral argument on BNSF's *Motion to Compel* in Skramstad et al. vs. BNSF Railway et al. DV-57-2002-459-AE the topic of trial settings and

the final pretrial order was discussed. Attorney John Lacey of McGarvey Law was present for this hearing as he represented Plaintiff Richard Shattuck in this ACC case. BNSF made the statement to the Court regarding how the discovery being sought was necessary so that the parties could prepare and be ready for trial on the date set by the Court. The Honorable Judge McMahon reminded counsel that no trial date was set. I corrected my statement to the Court to state that discovery was needed so that when the parties attended the final pretrial conference with the Court, both sides could represent to the Court that they are ready for a trial date if asked by the Court. The Court interjected and instructed both parties that it was the Court's expectation that the parties be ready for a trial date at the final pretrial conference and the Court does not intend on asking the parties, if they are ready.

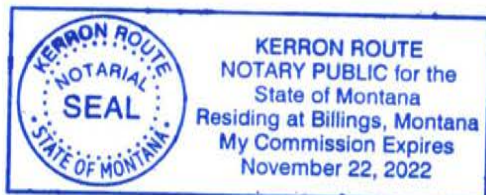
Dated this 13th day of July, 2021.

FURTHER AFFIANT SAYETH NAUGHT

By: 

Anthony M. Nicastro

SUBSCRIBED AND SWORN to before me on this 13th day of July, 2021, by Anthony M. Nicastro.





Notary Public for the State of Montana

EXHIBIT F

Anthony M. Nicastro

From: Anthony M. Nicastro
Sent: Wednesday, October 7, 2020 3:15 PM
To: 'Jinnifer Mariman'
Cc: Steven T. Williams; Heather A. Gentry
Subject: Question regarding the MacDonald case

Jinnifer – on the MacDonald case, would plaintiff be willing to come up with a discovery plan that sets a deadline for disclosure of expert witnesses and a close of discovery?



Anthony M. Nicastro, Member
27 Shiloh Rd., Ste. 10, Billings, MT 59106
nicastro@knightnicastro.com
P: 406-545-2031 F: 816-396-6233

Boulder • Billings • Kansas City • Missoula • Chicago • Peoria • St. Louis

EXHIBIT G

Roger Sullivan
Allan M. McGarvey
John F. Lacey
McGarvey, Heberling, Sullivan & Lacey, P.C.
345 First Avenue East
Kalispell, MT 59901
(406) 752-5566

Attorneys for Plaintiff

RECEIVED

JAN 08 2018

HedgerFriend, PLLC

FILED
2016 JAN 26 AM 9:50

BY DEPUTY

COPY

MONTANA EIGHTH JUDICIAL DISTRICT, CASCADE COUNTY

REBECCA J. BALL,

Plaintiff,

v.

STATE OF MONTANA, a governmental entity; BNSF RAILWAY COMPANY, a Delaware corporation; JOHN SWING; INTERNATIONAL PAPER COMPANY, a New York for profit corporation; ST. REGIS CORPORATION, a New York for profit corporation; J. NEILS LUMBER COMPANY, a Minnesota for profit corporation; MONTANA LIGHT & POWER COMPANY, a Montana for profit corporation; EVERETT NELSON; RALPH HEINERT; ROBINSON INSULATION COMPANY, a Montana Corporation for profit; and DOES A-Z,

Defendants.

CAUSE NO. **DDV-16-0060**

DIRK M. SANDEFUR

COMPLAINT AND DEMAND FOR JURY TRIAL

PARTIES

1. Plaintiff Rebecca J. Ball, is a resident of Lincoln County, Libby, Montana.
2. The State of Montana is a governmental entity.
3. Defendant BNSF Railway Company (BNSF) is a corporation organized and existing under the laws of the State of Delaware and is engaged in interstate commerce with its headquarters in Fort Worth, Texas.
4. Defendant John Swing was a managing agent for BNSF in Libby, Montana and is a resident of Lincoln County, Montana.
5. Defendant International Paper Co. is a corporation organized and existing

under the laws of New York with its principal place of business in the State of Connecticut.

6. Defendant International Paper Co. is a successor corporation which is liable for the actions of Champion International Corp., St. Regis Corp. and J. Neils Corp. with respect to the claims and allegations of this Complaint.

7. Defendant Champion International Corp. is or was a corporation organized and existing under the laws of New York with its principal place of business in the State of Connecticut.

8. Defendant Champion International Corp. is a successor corporation which is liable for the actions of St. Regis Corp. with respect to the claims and allegations of this Complaint.

9. Defendant St. Regis Corp. is or was a corporation organized and existing under the laws of New York with its principal place of business in the State of New York and is a successor corporation which is liable for the actions of J. Neils Corp. with respect to the claims and allegations of this Complaint.

10. St. Regis Corporation is a New York corporation which was dissolved on or about September 18, 1984. St. Regis Corp. is properly named as a defendant in this action pursuant to MCA § 35-1-935 and MCA § 35-1-937, because the dissolution of the corporation "does not take away or impair any remedy . . . against the corporation . . . for any claim or right whether or not the claim or right existed or accrued prior to dissolution."

11. Defendant Montana Light & Power, is a Montana Corporation currently inactive. At all times up to 1988, Montana Light & Power was doing business in Montana, including operating the powerhouse at the lumbermill in Libby.

12. Montana Light & Power merged into Champion International Corporation (CIC) and CIC assumed all liabilities of Montana Light & Power as a successor corporation, including claims under this complaint.

13. Defendants International Paper Co., Champion, St. Regis Corp., J. Neils Lumber Company, Everett Nelson, Ralph Heinert, and Does A-Q are referred to herein as

"Wood Products Defendants."

14. Defendants Everett Nelson and Ralph Heinert were managers of the corporate Wood Products Defendants.

15. Defendants Does A-F are corporate entities operating facilities relating to the lumber mill in Libby, Montana.

16. Defendants Does G-Q were managers of Wood Products Defendants International Paper Co., its predecessors in interest and/or its subsidiaries engaged in manufacturing operations of the forest products industry in Lincoln County, Montana, and whose true names are unknown at the present time.

17. At all times relevant to this action, Wood Products Defendants, their predecessors in interests and/or their subsidiaries and associates, engaged in logging and manufacturing operations of the forest products industry in Lincoln County, Montana.

18. Robinson Insulation Company (Robinson Insulation) is or was a Montana business corporation for profit with its principal place of business in Great Falls, Cascade County, Montana where Robinson Insulation operated a vermiculite expansion plant. Robinson Insulation engaged in conduct that resulted in the accrual of this tort action in Montana.

19. Does R - Z are corporations or persons, whose identities are unknown at this time, and whose negligence and wrongful acts caused asbestos related bodily injuries in the listed Plaintiffs.

20. Plaintiff will seek to amend her complaint when the true names and capacities of Does A - Z are ascertained.

21. Venue in this action is proper in Cascade County, Montana, because at least one of the Defendants, Robinson Insulation, engaged in tortious conduct within Cascade County and is a resident of Cascade County.

22. This Complaint is filed to protect statutes of limitations.

GENERAL ALLEGATIONS

23. In 1963 W.R. Grace & Co. (Grace) purchased an existing vermiculite mine and mill in Libby, Montana (the Mine) from the Zonolite Company (Zonolite), in the

process assuming all liabilities of Zonolite. Grace operated the Mine from 1963 until 1990. The vermiculite was intermixed with a highly toxic form of asbestos. The extraction of vermiculite from the ground and processing of it generated substantial airborne dust containing asbestos. The dust was produced at the mine site, as well as in the town of Libby where expansion, bagging, storage and transport facilities were located.

24. The Plaintiff was a Grace/Zonolite, railroad or logger/lumbermill worker, contractor, homeowner or member/resident of the community of Libby, Montana, and/or the child or spouse of said person, and as such were distinctly exposed to asbestos in unique exposure events and in a wide variety of temporally separated, geographically distinct, and highly differentiated routes and circumstances. While Plaintiff had repeated or continuous exposures, Plaintiff's individual exposure is unique in time, location, form, and degree of asbestos contact, and as a result of which Plaintiff has been diagnosed with asbestos disease. Dates of Plaintiff's residence in the Libby area and exposure are from 1981 - 1982, 1985 - 1986 and 1993 to date.

25. At all times Plaintiff was ignorant of the nature and extent of the life threatening risks and injury involved, and would not have continued to be exposed to such an environment if she had known the true facts.

26. The Grace/Zonolite workers were not provided with coveralls or showers. As a result workers went home and into the community with asbestos dust on their clothing and in their cars, thereby extending the asbestos exposure. Similarly, invisible asbestos fibers from the mining operations infiltrated a broad variety of Libby area work sites, forests, recreation areas, homes, gardens, and numerous other distinct locations, resulting in hundreds of distinct routes and circumstances of exposure.

27. As a result of failing to control dust from the mining, milling, processing, bagging, transport and a variety of uses of the vermiculite, workers, family members, members of the community, and others were exposed to the highly toxic asbestos.

28. Without knowledge of the nature and extent of the asbestos hazard, Plaintiff was denied, in the unique circumstances of her exposures, the options of avoiding

exposure, demanding protective devices, demanding safer operations, changing jobs, or protecting herself and her family.

29. The Montana State Board of Health ("BOH" or "Board") was created in 1907 under § 1474, RCM (1907). The BOH was responsible for the "general supervision of the interests and health and life of the citizens of the state." § 2448, RCM (1921); § 69-105, RCM (1947).

30. The Montana legislature mandated that as a part of the BOH's "functions, powers and duties" that the Board "shall make sanitary investigations and inquiries regarding the causes of disease; . . . causes of mortality, and the effects of localities, employments, conditions . . . and circumstances affecting the health of the people." The BOH was further charged to "gather such information in respect to all these matters as it may deem proper for diffusion among and use by the people. . . ." § 2448, RCM (1921); § 69-105, RCM (1947) (as revised in 1961, Replacement, Vol. 4).

31. The Montana Industrial Hygiene Act of 1939 Sections 2(1), (3) and (5), Ch. 127, L. 1939 (renumbered and codified at § 69-201-208, RCM (1947)) created within the BOH, an Industrial Hygiene Division (the Division) granting to the Division the powers to:

- (1) make studies of industrial hygiene and occupational disease problems in Montana industries; . . .
- (3) make investigations of the sanitary conditions under which men and women work in the various industries of the State; . . .
- (5) report to the industries concerned the findings of such investigations and to work with such industries to remedy unsanitary conditions.

32. In 1955, the Industrial Hygiene Division was effectively eliminated by the legislative decree of § 69-201, RCM (1947)(1961, Replacement, Vol. 4) providing that the BOH "shall possess, exercise and administer all of the powers, functions and authority, and shall carry out, discharge and execute all of the duties, in the field of industrial hygiene" set forth in § 69-201-208, RCM (1947). Thus, the BOH became exclusively responsible for the State's programs for general public health and safety as well as occupational/industrial health and safety.

33. § 69-105, RCM (1947) (1961, Replacement, Vol. 4) (effective 1955 to 1967) provided that the State Board of Health shall "... have general supervision of the interests of health and life of the citizens of the state," "... gather such information ... as it may deem proper for diffusion," ... and "... make sanitary investigations and inquiries regarding ... employments ..."

34. In 1967, the Montana legislature revised the public health and industrial hygiene statutes, creating the Department of Health (DOH). § 1, Ch. 197, L. 1967. The creation of the DOH resulted in the functions and duties of the BOH being divided between the BOH and the new DOH.

35. The DOH assumed the responsibility to "make investigations, disseminate information, and make recommendations for control of diseases and improvement of public health to persons, groups, or the public." § 69-4110(3), RCM (1947) (1969, 2d Replacement, Vol.4).

36. The DOH also became responsible for administering the industrial hygiene program (§ 69-4105(1), RCM (1947) (1969, 2d Replacement, Vol. 4)), requiring it to "investigate the conditions of work at any place of employment at any time," and to "report the findings of investigations to the industry concerned and co-operate with the industry in preventing or correcting conditions which are hazardous to health." § 69-4203(3) and (4), RCM (1947) (1969, 2d Replacement, Vol.4) .

37. The Montana Industrial Hygiene Act (1967), § 20 *et seq.* Ch. 197, L. 1967, provided:

The state board of health shall adopt rules and approve orders to correct or prevent conditions which are hazardous to health at any place of employment.

§ 69-4202, RCM (1947) (1969, Replacement, Vol. 4).

The State Department of Health shall:

(1) make studies, make recommendations, and issue orders approved by the State Board on industrial hygiene and on occupational diseases; ...

(4) report the findings of investigations to the industry concerned and cooperate with the industry in preventing or correcting conditions which are

hazardous to health;

(5) enforce provisions of this chapter, and rules adopted by the State Board.
§ 69-4203, RCM (1947) (1961, Replacement, Vol. 4).

38. § 69-4106, RCM (1947) (effective 1967 to 1971) provided that "The state Board shall . . . (d) . . . enforce rules and standards . . . for the preservation of public health and prevention of disease."

39. § 69-4203, RCM (1947) (1961, Replacement, Vol. 4) (effective 1967 to 1971) provided that the Board of Health: "shall . . . (3) . . . investigate the conditions of work . . . (4) . . . cooperate with the industry in preventing or correcting conditions which are hazardous to health."

40. The Montana Clean Air Act, § 69-3905, RCM (1967), provided as follows:

It is hereby declared to be the public policy of this state and the purpose of this act to achieve and maintain such levels of air quality as will protect human health and safety.

§ 69-3909, RCM (1967) provided:

In addition to any other powers conferred on it by law the [State Board of Health] shall: . . .

(3) Issue such orders as may be necessary to effectuate the purposes of this act and enforce them by all appropriate administrative and judicial proceedings.

(4) Require access to records relating to emissions.

§ 69-3914, RCM (1967) further provided:

(1) Whenever the board has reason to believe that a violation of any provision of this act or rule made pursuant thereto has occurred, it may cause written notice to be served upon the alleged violator or violators. The notice . . . may include an order to take necessary corrective action within a reasonable period of time stated in the order.

41. In 1971, the industrial hygiene statutes were further revised by the Occupational Health Act, (OHA) of Montana. § 1, Ch. 316, L. 1971; § 69-4206, RCM (1947) (Supp. 1977). The policy and purpose of the OHA was:

(1) ... to achieve and maintain such conditions as will protect human health and safety, and to the greatest degree practicable, foster the comfort and convenience of the workers at any workplace of this state and enhance their

productivity and well-being.

(2) To these ends it is the purpose of this act to provide for a co-ordinated statewide program of abatement and control of occupational diseases

42. The OHA act mandated that the BOH (re-named the "Board of Health and Environmental Sciences" by the OHA) adopt rules implementing the Act, establish threshold limit values of airborne contaminants, and issue orders necessary to carry out the Act. The OHA granted the Department powers that included a requirement that the DOH enforce orders issued by the Board, prepare and develop a comprehensive plan for the prevention, abatement and control of occupational diseases, determine "the degree of health hazard at any workplace" and "collect and disseminate information and conduct educational and training programs relating to the prevention and control of occupational diseases." § 69-4211.1(1), (3), (6) and (7), RCM (1947) (Supp.1977).

43. Under the OHA, the Department also had the power to take enforcement actions and impose monetary penalties on violators of the OHA. §§ 69-4215 and 69-4221, RCM (1947) (Supp. 1977). Additionally, the OHA set forth a specific "emergency procedure" to be implemented by the Department upon discovering "a generalized hazard at a workplace" that "creates an emergency requiring immediate action to protect human health." § 69-4216(1), RCM (1947) (Supp. 1977). In such circumstances, the Department was required to order the persons causing or contributing to the hazard to "reduce or discontinue immediately the emissions creating the hazard." § 69-4216(1), RCM (1947) (Supp. 1977). In the absence of a general condition creating an emergency, the Department was granted the power to order the persons responsible for the "emissions from an operation ... causing imminent danger to human health" to reduce or discontinue such emissions immediately. § 69-4216(2), RCM (1947) (Supp. 1977).

44. In 1978, the OHA was renumbered and became § 50-70-101, *et seq.* MCA. The public polices of the former state department of public health were extended through the department of public health and human services' charge to "(1) . . . protect and promote the public health, . . . [in that it]" shall: "(a) make inspections for conditions of public health importance and issue written orders for correction, destruction, or removal of the condition; (b) disseminate information and make recommendations for control of

diseases and other conditions of public health importance;” § 50-70-102, MCA.

45. The 1972 Montana Constitution provides in Article II § 3 that all persons have the inalienable right “to a clean and healthful environment” and provides in Article IX § 1(1) that “the State and each person shall maintain and improve a clean and healthful environment in Montana”

46. In 1956 the State Board of Health, Division of Disease Control, undertook an industrial hygiene study of the Zonolite mine and mill operation at Libby, Montana “to determine if any of the components of this company were detrimental to the health of the employees.” The 1956 report, p. 3, found high dust levels, that the dust contained asbestos, and that “the asbestos dust and the dust in the air is of considerable toxicity.” It cited medical literature. The 1956 report found dust levels greatly exceeding the asbestos limit, and recommended dust control measures. The 1956 report, p. 6, states:

Full recognition should be given to the fact that direct control measures alone are usually not enough to insure safe working conditions. The method of operations, proper maintenance of equipment and of housekeeping are equally essential to maintain healthful conditions.

That until such time as the repair and maintenance of both the exhaust and ore conveying systems have been complete, all the men in the dry mill be provided with and required to wear an adequate respirator.

No further action was taken in 1956 and 1957.

47. In 1958, the State Board of Health, Division of Disease Control, undertook another industrial hygiene study of the Zonolite mine and mill operation “to determine if any of the components of this company found to be detrimental to the health of the employees during the last study in August, 1956 had been reduced or alleviated since that time.” The report again found dust levels greatly exceeding the asbestos limit, and recommended dust control measures. The report, at p. 8, cites medical literature showing that asbestosis is “a progressive disease with a bad prognosis,” often fatal. The report, at p. 8, finds that asbestos dust “concentrations had, as yet, not been reduced to a satisfactory level over all The dry mill still required a considerable amount of work to reduce the dust in this area to an acceptable level.” No further action was taken by the State Board of Health, Division of Disease Control in 1958, 1959, 1960, or 1961.

48. In 1959, the State of Montana, State Tuberculosis Sanitarium treated Glenn Taylor, a Libby Zonolite mine worker, for shortness of breath and asbestosis.

49. In 1961, the State of Montana, through formal death certificate reporting procedures, had notice that Glenn Taylor died of asbestosis, and that Charles Wagner, a mechanic at Zonolite in Libby, died of pulmonary fibrosis.

50. In 1962, the State Board of Health, Division of Disease Control, undertook an industrial hygiene study of the Zonolite mine and mill operation "to determine if any of the components of the operations continued to be a threat to the health of the employees." The report again found dust levels far in excess of the asbestos limit, and recommended dust control measures. The report, at p. 4, concludes "as indicated in the findings of this study, it appeared that no progress had been made in reducing dust concentrations in the dry mill to an acceptable level and that, indeed, the dust concentrations had been increased, substantially, over those in the past." No further action was taken in 1962.

51. In 1963, the State Board of Health, Division of Disease Control, undertook an industrial hygiene study of the Grace/Zonolite mine and mill. The report again found dust levels greatly exceeding the asbestos limit, and recommended dust control measures. The report, at p. 3, found a "hazardous condition existing at this plant." No further action was taken in 1963.

52. In April of 1964, the State Board of Health, Division of Disease Control, undertook an industrial hygiene study of the Grace/Zonolite mine and mill "to determine if compliance with previous recommendations for the control of dust had been achieved." The report again found dust levels greatly exceeding the asbestos limit, and recommended dust control measures. The report cited an article by Dr. Irving Selikoff (1964), finding dangerous levels of asbestos disease in asbestos insulation workers with "light intermittent exposure to asbestos." The State knew that the Libby workers had heavy and frequent exposure to asbestos. The 1964 report states at p. 3, "the asbestos content of the material with which you are working appears to provide some serious potential for the development of disease if not properly controlled. In addition, the

discharge of large volumes of asbestos-laden dust at ground levels sets up a condition where all members of the plant can be exposed in addition to those who work in the dry mill." While still referencing the Selikoff article, the State's report noted that environmental exposure has been shown to cause lung abnormalities and a question of "possible widespread carcinogenic air pollution." The State's report identifies that "floating fibers do not respect job classifications," and that per Selikoff, "insulation workers undoubtedly share their exposure with workmates in other trades." The State cited to Selikoff for an example of asbestos fibers having been identified in individuals living near an asbestos factory, and noted that this demonstrates that exposure goes beyond employees and workmates, and into the surrounding community.

53. In September, 1964, the State Board of Health, Division of Disease Control, undertook an industrial hygiene study of the Grace/Zonolite mine and mill "to determine if the concentrations were excessive as has been found in many previous studies." The report again found dust levels greatly exceeding the asbestos limit, and recommended dust control measures. The report states at p. 3 "the dust discharged at ground level from the main dust collection fan was continuously contaminating the whole plant work area and needs to be either raised substantially so the dust-laden air discharges substantially above the plant area or that cleaning be provided. There was much reentry of this dust into the working environment." The report concludes at p. 3 with the "hope that continued work to reduce dust concentrations will be done and that a continuous operation at acceptable levels will be achieved soon."

54. In 1964, the State of Montana, through formal death certificate procedures, had notice that Albert Barney, a millworker at Zonolite in Libby died of cor-pulmonale.

55. In 1966, the State of Montana, through formal death certificate reporting procedures, had notice that Walter McQueen, a miner from Libby, died of asbestosis.

56. In 1967, the State Board of Health, Division of Disease Control, undertook an industrial hygiene study of the Grace/Zonolite mine and mill "to determine compliance with previous recommendations." The report, at p. 2, concluded "as in the past, the need for particularly close attention to the functioning of the dust control system,

condition of duct work, . . . was apparent. It was also apparent that a strict housekeeping program must be maintained." No further action was taken by the State Board of Health, Division of Disease Control in 1967, 1968, 1969, 1970 and 1971.

57. In November 1967, evidence was presented to the Chairman of the State Industrial Accident Board that another worker at the Grace/Zonolite mine and mill had been diagnosed with asbestosis from work in the warehouse.

58. In 1974 the Montana State Department of Health performed an investigation of the airborne asbestos exposure at the Grace mine and mill. No action was taken.

59. From 1967 to about 1974, Grace regularly reported on the status of dust control at its operations in Libby to the State of Montana.

60. All the above described reports of the State of Montana, Division of Disease Control, were delivered to Grace, or its predecessor, Zonolite. None of the reports were made public, nor were the Grace workers, their families, or members of the Libby community warned of what the State had found.

61. The State continued to receive additional notice of the nature and extent of the asbestos hazard to Grace workers, their families, and members of the Libby community through a myriad of State agency activities and reports.

62. In 1970, Grace applied to the State Board of Health for a variance from air pollution statutes (§ 69-3904 et. seq., RCM 1947). The State Board of Health granted Grace its desired exemption on September 11, 1970, thereby allowing Grace to continue its hazardous operations. Grace subsequently filed multiple renewal petitions for the variance, all of them based on Grace's representations to the State Board of Health that Grace needed to continue to operate the dry mill despite its inherent and previously identified problems with hazardous emissions. On September 27, 1974, the State Board of Health granted Grace its final variance.

63. From 1970 to 1974, Grace requested, and the State granted, no less than seven variances or variance extensions. The State had the opportunity to deny the requests or require Grace to comply with industrial hygiene standards as a requirement of

any variance. The State was aware throughout this whole period that Grace continued to fail in its asbestos dust control measures, and that as a result of its failures excessive and dangerous amounts of asbestos were being emitted in violation of applicable requirements. The State knew that these failures posed a risk to human health, yet it knowingly and willingly passed on these multiple opportunities to shut down Grace's operations or exercise any of its authority to bring Grace into compliance with applicable standards by denying or under threat of denying the variances.

64. The State exercised its authority at the Grace Libby operations through the Department of Health and Environmental Sciences. Beginning in December 1970, the Department of Health and Environmental Sciences received permit requests from Grace seeking authority to construct many various dust control systems at multiple sites involved in Grace's Libby operation. Between 1971 and 1980, the Department of Health and Environmental Sciences granted Grace no fewer than six different permits on dust control measures. All but one was approved without any stipulations.

65. By 1971, 14 workers at the Grace mine and mill had died of asbestos disease.

66. The Department of Health and Environmental Sciences also conducted no fewer than seven different inspections of Grace's Libby operations between April 1979 and October 1987. The State's notes from these inspections include a 1979 citation for violation of Air Contaminant Restriction based upon visible emissions from the dryer stack at the mill, and a 1987 discussion of "the asbestos situation at the mine with [Grace personnel]."

67. In 1983, the Department of Health and Environmental Sciences received a report from the Environmental Protection Agency (EPA) regarding an epidemiological study of Libby Grace workers. The report identified to the State that 109 former Libby Grace employees had died, 16 workers had lung cancer, and two had mesothelioma, and that this was corroborative of written scientific opinion on the effects of asbestos exposure.

68. The Department of Health and Environmental Sciences was involved in

quantifying and analyzing the Grace operation. Notably, the State received information on the quantity of vermiculite processed at the entire operation, received and sought information regarding the asbestos contained in the vermiculite and the health risks posed by exposure. However, the State failed to take action despite its continuous and ongoing involvement.

69. The Department of Health and Environmental Sciences wrote to Grace in 1987, seeking information on what it considered the "most important pollutant," identifying, "Asbestos associated with your entire operation." After this letter and inspection to Grace, the Department of Health and Environmental Sciences wrote to the EPA for information about the public health risk from asbestos exposure. The State's letter stated, in part, "In permitting the mining, concentrating, and milling of the vermiculite ore, the question of public health risk from asbestos exposure needs to be addressed."

70. The Montana Department of State Lands was involved in conducting inspections of Grace's Libby mining operations pursuant to its permitting and oversight authority under mine reclamation statutes. (§ 50-1200 et. seq., RCM 1947). The Department of State Lands conducted inspections in 1975, 1979, 1985, 1987, and 1994. Despite knowledge of the health hazard and asbestos content at the mine, the State continued to permit and inspect the Libby mine without taking any action on the problems associated with the asbestos.

71. The Montana Department of State Lands regularly exercised its permitting and oversight authority of Grace's Libby operations. Beginning in November 1971, the Department of State Lands issued permits to, and received annual operating reports from, WR Grace until 1990. Despite specific knowledge of the asbestos hazard at Grace's Libby mining operation, the Department of State Lands authorized multiple permitting amendments to increase the mine size. In each instance the State determined that no environmental review was required. An environmental review is intended to evaluate impacts on both the environment and human health. The environmental review would have required the State to conduct a thorough analysis of the human health impacts from

the mine, and the public process required by an environmental review would have revealed to the Libby community the impacts on human health from Grace's mining and milling operation.

72. The Employment Relations Division (ERD) of the Montana Department of Labor and Industry separately tracked and regulated Grace and its Libby operation. The Safety Bureau inspected the Grace mine for compliance with state occupational safety and health codes, and the Workers Compensation Claim Assistance Bureau received notices of claims filed by workers for work-related injury or disease.

73. Between June 1974 and February 1991, the Department of Labor and Industry conducted no fewer than 20 inspections of Grace's Libby operations. Many of these inspections generated citations and required abatement by Grace. One inspection, in October 1985, was conducted to become familiar with Grace's effort to minimize asbestos exposure to employees. At this same inspection, the State gave a safety presentation to Grace employees addressing back injury prevention and safety glasses. There is no record that the State discussed the asbestos hazard with Grace employees at this presentation. Despite its knowledge of the asbestos hazard at Grace, the Workers Compensation Claim Assistance Bureau reported in 1985 that it was not testing for asbestos based on efforts by federal inspectors to sample asbestos at Grace twice per year, the frequent communication between federal officials and the Safety Bureau, and the access that the State had to federal inspection reports. In addition, the Claims Assistance Bureau administered a number of claims for asbestosis or lung related conditions involving Grace workers.

74. From 1971-1991, a number of federal agency inspections of the Grace mine and mill showed violations of asbestos dust control requirements. The State of Montana was either a participant in, copied on the reports of, or had access to said inspections. Federal inspections in 1971, 1972, 1973, 1974 and 1975 found dangerous levels of asbestos dust at the Grace mine and mill. The State of Montana did nothing to warn the workers, their families, or the community of the dangers of asbestos disease.

75. Following the closure of Grace's mine operations in approximately 1990,

the State of Montana continued to inspect the Grace operation for occupational and environmental health hazards.

76. The State had knowledge and notice throughout the period of Plaintiff's residence in the Libby area that Plaintiff was within the specific community that was at risk from the asbestos hazard created by Grace's Libby operations.

FIRST CLAIM
Negligence v. State of Montana

77. All paragraphs above are incorporated by this reference.

78. The State of Montana acquired insurance or undertook a comprehensive plan of insurance thereby waiving sovereign immunity.

79. The cause of action in this case arose after July 1, 1973, and there is no sovereign immunity. (Art. II §18, 1972 Montana Constitution.)

80. At all times pertinent herein, the State of Montana had a continuing duty to gather information, and to act on acquired information to protect and to warn endangered populations, of which Plaintiff is a member.

81. The State Board of Health, Division of Disease Control, undertook specific action to cause corrective measures to be taken to protect Plaintiff and others similarly situated.

82. The State of Montana negligently failed to take sufficient action to protect Plaintiff from known hazards of asbestos exposure.

83. The State of Montana negligently failed to gather sufficient information as to the extent of disease in workers at the Grace/Zonolite mine and mill operation.

84. The State of Montana negligently failed to inform and warn Plaintiff of the hazards of asbestos exposure.

85. As a direct, proximate and legal result of the State of Montana's negligence and unlawful conduct, and that of its agencies and agents as described above: Plaintiff suffered from asbestos disease and asbestos related bodily injuries and has incurred the damages alleged herein. The event and occurrence of the Plaintiff's exposures to asbestos happened in a wide variety of temporally separated, geographically distinct, and highly

differentiated routes and circumstances. While Plaintiff had repeated or continuous exposure, Plaintiff's individual exposure history is unique in time, location, form, and degree of asbestos contact. The occasion when asbestos fibers caused injury to Plaintiff occurred in unique circumstances of an event of injurious exposure to asbestos fibers, and the causal event of each person's bodily injury is unique.

SECOND CLAIM
Violation of the Montana Constitution

86. All paragraphs above are incorporated by this reference.

87. Plaintiff has the following inalienable rights, pursuant to the Montana Constitution, Article II, § 3:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways.

88. Plaintiff has the further constitutional rights pursuant to the Montana Constitution, Article IX, § 1:

The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

89. The past, present and continuing asbestos exposures caused and allowed by the State on multiple occasions violate the inalienable right of Plaintiff to a clean and healthful environment and breach the Defendants' duty to maintain and improve a clean and healthful environment for Plaintiff.

90. As a direct, proximate and legal result of the Defendants' violation of the enumerated rights of Plaintiff under the Montana Constitution: Plaintiff has been exposed to asbestos, suffered from asbestos disease and asbestos related bodily injuries, and incurred the damages alleged herein. The event and occurrence of the Plaintiff's exposures to asbestos happened in a wide variety of temporally separated, geographically distinct, and highly differentiated routes and circumstances. While Plaintiff had repeated or continuous exposures, Plaintiff's individual exposure history is unique in time, location, form, and degree of asbestos contact. The occasion when asbestos fibers caused

injury to Plaintiff occurred in unique circumstances of an event of injurious exposure to asbestos fibers, and the causal event of each person's bodily injury is unique.

THIRD CLAIM
Negligence v. BNSF

91. Paragraphs 1-76 above are incorporated by this reference.

92. During the dates above stated, Plaintiff resided or remained in proximity to the real property of BNSF and was thereby exposed to asbestos dust from BNSF's property and operations. John Swing was a managing agent for BNSF in Libby, Montana, and as such is separately responsible for acts wrongful in this nature. Allegations herein as to BNSF's conduct and knowledge by this reference specifically include defendant John Swing.

93. Throughout the years of exposure above stated, the Plaintiff lived in an environment that caused her to be exposed to and to inhale asbestos dust.

94. At all times Plaintiff was ignorant of the nature and extent of the life threatening risks and injury involved, and would not have continued to remain in such an environment if she had known the true facts.

95. Without knowledge of the nature and extent of the asbestos hazard, Plaintiff was denied the options of avoiding exposure, demanding dust control or changing residence.

96. At all times BNSF knew or should have known of the asbestos in the vermiculite, and knew or should have known of the hazards to human health of asbestos exposure and had a continuing duty to gather information, to prevent toxic dust from collecting upon and escaping from its property, and to warn Plaintiff and others who would be harmed by said dust.

97. BNSF was negligent, as follows:

- (a) in failing to inquire, study and evaluate the dust hazard to human health;
- (b) in failing to take measures to prevent toxic dust from collecting upon and escaping from its property;
- (c) in failing to warn Plaintiff of the true nature of the hazardous effects

of the dust; and

- (d) by acting in concert with Zonolite/Grace.

98. As a direct and proximate result of the conduct of BNSF as described above, Plaintiff suffered from asbestos disease and asbestos related bodily injuries and has incurred the damages alleged herein.

FOURTH CLAIM Common Law Strict Liability v. BNSF

99. Paragraphs 91-98 above are incorporated by this reference.

100. Defendant BNSF failed to control asbestos contaminated vermiculite used in the operation of their business thereby causing Plaintiff to be exposed to asbestos, an extra hazardous and abnormally dangerous substance.

101. Defendant BNSF engaged in abnormally dangerous activities thereby causing the release of asbestos contamination and exposure of Plaintiff to deadly asbestos. BNSF's business activities in handling, storing, transporting, loading, and using asbestos and asbestos contaminated products were abnormally dangerous in that:

- (a) said business activities created a high degree of prior, present, and continuing contamination in the form of exceedingly toxic asbestos, which created a high degree of risk of harm to Plaintiff and others;
- (b) there was and is a strong likelihood that the harm resulting from said business activities and exposure to asbestos is great;
- (c) the risk of harm caused by BNSF's storing, handling, transporting, loading, and using asbestos contaminated vermiculite cannot be reasonably eliminated for those humans living and working in proximity to BNSF's abnormally dangerous business activity;
- (d) said business activities are not a matter of common usage;
- (e) BNSF's abnormally dangerous business activities were carried on within the town of Libby and adjacent areas, which were places that were inappropriate for the release of asbestos contamination; and
- (f) the dangerous attributes of the BNSF's business activities completely outweigh the value of those activities to the community.

102. The dangers of the BNSF's business activities for the locality where Plaintiff resided, worked, or remained were so great that despite any usefulness of their

activities and of the asbestos contaminated vermiculite under its control, BNSF should be required as a matter of law to pay for any harm caused.

103. BNSF is strictly liable to the Plaintiff for damages caused by Plaintiff's exposure to deadly asbestos caused by BNSF's abnormally dangerous business activities.

104. As a direct and proximate result of the BNSF's abnormally dangerous business activities, Plaintiff was exposed to unreasonably dangerous and hazardous materials, contracted asbestos related disease, Plaintiff suffered from asbestos disease and asbestos related bodily injuries and has incurred the damages alleged herein.

FIFTH CLAIM

Strict Products Liability v. Wood Products Defendants

105. All paragraphs above are incorporated by this reference.

106. At all times relevant to this action, Plaintiff lived in or around the town of Libby. She shopped, visited and enjoyed recreation in the town of Libby and its vicinity as indicated above.

107. At times relevant to this action, the Wood Products Defendants were engaged in the business of manufacturing, fabricating, modifying, expanding, labeling, distributing, supplying, selling, marketing, packaging, and/or advertising products containing vermiculite. Said vermiculite was laced with deadly asbestos.

108. The Wood Products Defendants knew and intended that the above referenced vermiculite and asbestos contaminated products would be used without inspection for defects therein or in any of their component parts and without knowledge of the hazards involved in such use.

109. The Wood Products Defendants distributed and/or sold said asbestos-laced vermiculite products to the public, to the Plaintiff, and to one or more of Plaintiff's employers.

110. Said asbestos-laced vermiculite products were defective and unreasonably dangerous for their intended purpose in that the inhalation of asbestos fibers causes serious disease and/or death to humans. The defect existed in the said products at the time they left the possession of the Wood Products Defendants. Said products did, in

fact, cause injury and damage to Plaintiff, while being used in a reasonably foreseeable manner, thereby rendering the same defective, unsafe, and unreasonably dangerous for use.

111. Plaintiff did not know of the substantial danger of using said asbestos-laced vermiculite products, nor was said danger readily recognizable by her. The Wood Products Defendants further failed to adequately warn of the risk of contamination to which Plaintiff was exposed.

112. As a direct and proximate result of the unlawful actions of the Wood Products Defendants, and as a direct and proximate result of exposure to the Wood Products Defendants' unreasonably dangerous asbestos vermiculite products, Plaintiff suffers from asbestos related bodily injuries and has incurred damages as alleged herein.

SIXTH CLAIM

Common Law Strict Liability v. Wood Products Defendants

113. All paragraphs above are incorporated by this reference.

114. The Wood Products Defendants failed to control asbestos contaminated vermiculite used in the operation of their business thereby causing Plaintiff to be exposed to asbestos, an extra hazardous and abnormally dangerous substance.

115. The Wood Products Defendants engaged in abnormally dangerous activities thereby causing the release of asbestos contamination and exposure of Plaintiff to deadly asbestos. The Wood Products Defendants' business activities in handling, storing, transporting, loading, and using asbestos were abnormally dangerous in that:

- (a) said business activities created a high degree of prior, present, and continuing contamination in the form of exceedingly toxic asbestos, which created a high degree of risk of harm to Plaintiff and others;
- (b) there was and is a strong likelihood that the harm resulting from said business activities and exposure to asbestos is great;
- (c) the risk of harm caused by the Wood Products Defendants storing, handling, transporting, loading, and using asbestos contaminated vermiculite cannot be reasonably eliminated for those humans living and working in proximity to the Wood Products Defendants abnormally dangerous business activity;
- (d) said business activities are not a matter of common usage;

- (e) the Wood Products Defendants' abnormally dangerous business activities were carried on within the town of Libby and adjacent areas, which were places that were inappropriate for the release of asbestos contamination; and
- (f) The dangerous attributes of the Wood Products Defendants' business activities completely outweigh the value of those activities to the community.

116. The dangers of the Wood Products Defendants' business activities for the locality where Plaintiff resided, worked, or remained were so great that despite any usefulness of their activities and of the asbestos contaminated vermiculite under its control, the Wood Products Defendants should be required as a matter of law to pay for any harm caused.

117. The Wood Products Defendants are strictly liable to the Plaintiff for damages caused by Plaintiff's exposure to deadly asbestos caused by the Wood Products Defendants' abnormally dangerous business activities.

118. As a direct and proximate result of the Wood Products Defendants' abnormally dangerous business activities, Plaintiff was exposed to unreasonably dangerous and hazardous materials, Plaintiff suffered asbestos related bodily injuries and has incurred damages as alleged herein.

SEVENTH CLAIM **Negligence v. Robinson Insulation**

119. All paragraphs above are incorporated by this reference.

120. For many years, Defendant Robinson Insulation obtained asbestos contaminated vermiculite from Libby, Lincoln County, Montana. Said asbestos contaminated vermiculite was transported by rail from Lincoln County to Great Falls, Cascade County, Montana, where Defendant Robinson Insulation expanded the asbestos contaminated vermiculite and processed it into various manufactured products.

121. After expanding the deadly asbestos contaminated vermiculite and processing it into manufactured products, Robinson Insulation sold said vermiculite and vermiculite products to the J. Neils/St. Regis Champion lumbermill in Libby and to others for use and for resale in Libby, Montana. Said expanded vermiculite and

vermiculite products were transported from Great Falls back to Libby and delivered to the said lumbermill and to other sites in Libby.

122. Plaintiff was exposed to Defendant Robinson Insulation's unreasonably dangerous asbestos contaminated products, which Robinson Insulation wrongfully placed in the stream of commerce for use and consumption by the general public.

123. During Plaintiff's period of exposure to asbestos and contaminated vermiculite, which was generated and released by Robinson Insulation's business activities, Robinson Insulation knew that extended exposure to asbestos was unreasonably dangerous and hazardous to an individual's health. Nevertheless, Robinson Insulation concealed and failed to disclose such knowledge to their employees, the public, and the Plaintiff. Robinson Insulation gave no indication that it was unsafe and in fact a serious health hazard for Plaintiff to be exposed to asbestos generated and released by Robinson Insulation's business activities. Plaintiff was at all times ignorant of the nature and extent of the life threatening risk involved in exposure to the asbestos generated and released by Defendant's business activities.

124. Robinson Insulation owed the Plaintiff a duty to act with reasonable care concerning their business operations, so as not to jeopardize her health and welfare from exposure to its asbestos contamination and asbestos products.

125. Robinson Insulation breached its duty of care by negligently, carelessly, and recklessly generating, handling, storing, releasing, disposing of, and failing to control and contain unreasonably dangerous and hazardous asbestos created by and/or resulting from its for profit business operations.

126. Although Robinson Insulation knew or had ample reason to know that its acts or omissions created a high degree of harm to the Plaintiff, it nevertheless deliberately acted in conscious disregard of and indifference to the risk imposed upon the Plaintiff by her continued exposure to asbestos.

127. As a direct and proximate result of Plaintiff's exposure to asbestos-laced vermiculite generated and released by Robinson Insulation's business activities, Plaintiff suffers from asbestos disease and asbestos related bodily injuries and has incurred the

damages alleged herein.

EIGHTH CLAIM
Strict Products Liability v. Robinson Insulation

128. All paragraphs above are incorporated by this reference.

129. At times relevant to this action, Defendants Robinson Insulation was engaged in the business of manufacturing, fabricating, modifying, expanding, labeling, distributing, supplying, selling, marketing, packaging, and/or advertising multiple products containing vermiculite. Said vermiculite was laced with deadly asbestos.

130. Defendant Robinson Insulation knew and intended that the above referenced vermiculite and asbestos contaminated products would be used without inspection for defects therein or in any of their component parts and without knowledge of the hazards involved in such use.

131. Defendant Robinson Insulation distributed and/or sold said asbestos-laced vermiculite products to the public, to the Plaintiff, and to one or more of Plaintiff's employers.

132. Said asbestos-laced vermiculite products were defective and unreasonably dangerous for their intended purpose in that the inhalation of asbestos fibers causes serious disease and/or death to humans. The defect existed in the said products at the time they left the possession of Defendant Robinson Insulation. Said products did, in fact, cause injury and damage to Plaintiff, while being used in a reasonably foreseeable manner, thereby rendering the same defective, unsafe, and unreasonably dangerous for use.

133. Plaintiff did not know of the substantial danger of using said asbestos-laced vermiculite products, nor was said danger readily recognizable by her. Defendant Robinson Insulation further failed to adequately warn of the risk of contamination to which Plaintiff was exposed.

134. As a direct and proximate result of the unlawful actions of Defendant Robinson Insulation and as a direct and proximate result of exposure to Robinson Insulation's unreasonably dangerous asbestos contaminated vermiculite products,

Plaintiff suffers from asbestos disease and asbestos related bodily injuries and has incurred the damages alleged herein.

NINTH CLAIM

Does A-Z

135. All paragraphs above are incorporated by this reference.

136. Does A-Z are corporations or persons unknown at this time whose negligence and wrongful acts caused asbestos disease in the Plaintiff. Plaintiff will seek to amend her complaint when the true names and capacities of Does A-Z are ascertained.

DAMAGES

137. All paragraphs above are incorporated by this reference.

138. Each separate wrongful act of the State constitutes a separate claim within the meaning of § 2-9-108, MCA.

139. As a direct and proximate result of the acts of the Defendants, the Plaintiff has suffered and will suffer:

- a. Loss of enjoyment of established course of life;
- b. Loss of services which can no longer be performed;
- c. Loss of earnings and/or earning capacity;
- d. Physical, mental and emotional pain and suffering;
- e. Medical expenses, rehabilitation expenses and related expenses;
- f. Loss of insurability for medical coverage; and
- g. Great grief and sorrow.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for damages against the State of Montana in an amount subject to the limitations provided by law for each claim and for damages against other Defendants as follows:

1. Reasonable damages for lost enjoyment of established course of life, past and future;
2. Reasonable damages for loss of services which can no longer be performed;
3. Reasonable damages for physical, mental and emotional pain and suffering, past and future;
4. Reasonable damages for medical expenses, rehabilitation expenses, and related expenses incurred to date and reasonably certain to be

- incurred in the future;
5. Advance payment of past and present medical expenses and special damages not reasonably in dispute;
 6. Reasonable damages for loss of earnings and/or earning capacity;
 7. Reasonable damages for grief and sorrow;
 8. For costs of suit;
 9. For such further relief as is just and equitable under the circumstances.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands a trial by jury.

DATED this 26th day of January, 2016.

McGARVEY, HEBERLING, SULLIVAN
& LACEY, P.C.

By: _____

ROGER SULLIVAN
ALLAN McGARVEY
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EXHIBIT H

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BNSF RAILWAY COMPANY & JOHN SWING

MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

JASON C. MACDONALD, Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware corporation; JOHN SWING; INTERNATIONAL PAPER COMPANY, a New York Corporation; CHAMPION INTERNATIONAL CORPORATION, a New York for Profit Corporation; ST. REGIS CORPORATION, a For Profit Corporation; J. NEILS LUMBER COMPANY, a For Profit Corporation; MONTANA LIGHT & POWER COMPANY, a Montana for profit corporation; ROBINSON INSULATION COMPANY, a Montana Corporation; and Does A-Z, Defendants.	Cause No.: DDV-16-0549 Judge John Parker DEFENDANTS BNSF RAILWAY COMPANY AND JOHN SWING'S COMBINED MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT
--	--

Defendants, BNSF RAILWAY COMPANY and JOHN SWING ("Defendants"), by and
through their counsel of record, Anthony M. Nicastro and Steven T. Williams of Knight Nicastro

MacKay, LLC, and hereby submits its *Combined Motion for Summary Judgment and Brief in Support* pursuant to Mont. R. Civ. Proc., Rule 56.

MOTION

Plaintiff Jason MacDonald filed this action on June 22, 2016, alleging that he was exposed to asbestos while living in and around Libby, Montana, between 1977 and 2001 resulting in an asbestos-related disease. Plaintiff recently filed a motion with the Asbestos Claims Court, admitting that he is withdrawing the only medical evidence in support of his claim of an asbestos-related disease. As such, Plaintiff no longer has evidence to support his claim.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATEMENT OF UNDISPUTED FACTS

1. Plaintiff Jason MacDonald filed this lawsuit against BNSF, John Swing, and the other defendants, alleging that the defendants were negligent, causing him to be exposed to asbestos and that he contracted an asbestos-related disease as a result of the exposure. *See Complaint*, ¶¶ 19-29.
2. Plaintiff has asserted that he was diagnosed with an asbestos-related disease by Dr. Brad Black of the CARD Clinic in Libby, Montana. **Exhibit A: Registry Motion**, p. 3.
3. No other treating doctors have found evidence of an asbestos-related illness. **Exhibit A**, p. 3. (“Currently, the only doctor supporting his diagnosis is CARD Clinic provider Dr. Brad Black.”)
4. Plaintiff has stated that he is not going to call Dr. Black to testify at trial. **Exhibit A**, pp. 1-2.

5. The radiologists who have reviewed MacDonald's CT Scans and x-rays have found no evidence of a pleural disease or asbestos exposure. **Exhibit B:** *Benedetto CT (6/18/18)* ("There is no pleural thickening or pleural or diaphragmatic calcification present" ... "No significant pleural disease present"); **Exhibit C:** *Naspinsky CT (10/10/16)* ("No evidence for interstitial lung disease."); **Exhibit D:** *Becker CT (7/8/13)* ("No pleural based thickening or plaquing is noted" ... "No evidence for previous asbestos exposure"); and **Exhibit E:** *MacDonald B-READS*.
6. To date, Plaintiff has not noticed up an expert witness to testify that Plaintiff has a lung disease, and that such disease was caused by exposures to asbestos in Libby, Montana.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the pleadings, affidavits, discovery and disclosure materials show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c)(3), Mont. R. Civ. P. Summary judgment provides a party the opportunity to avoid costly litigation by securing a just and speedy resolution of the action while relieving the courts of the burden and expense of unwarranted litigation. *Celotex Corp. v. Catrett*, 477 U.S. 317, 320–23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The moving party has the burden of demonstrating the absence of genuine issues of material fact. *Olympic Coast Inv., Inc. v. Wright*, 2005 MT 4, ¶ 20, 325 Mont. 307, 105 P.3d 743. "Material" facts are those that "involve the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Mt. W. Bank, N.A. v. Mine & Mill Hydraulics*, 2003 MT 35, ¶ 28, 314 Mont. 248, 64 P.3d 1048 (internal quotations and citation omitted). "Once the moving party has met its burden, the opposing party must present material and substantial evidence, rather than mere

conclusory or speculative statements, to raise a genuine issue of material fact.” *Olympic Coast Inv., Inc.*, ¶35.

ARGUMENT

A. Plaintiff has insufficient evidence to proceed to trial.

Plaintiff lacks any medical evidence that he has a lung disease, let alone that such a condition was caused by exposure to Libby asbestos. MacDonald’s counsel recently stated that “[c]urrently, the only doctor supporting his diagnosis is CARD Clinic provider Dr. Brad Black.” **Exhibit A**, p. 3. Despite this, Plaintiff’s counsel has confirmed that they do not intend on having Dr. Black testify in this case. *See Id.* at pp. 1-2. (“Counsel have affirmatively stated we would not be calling Dr. Black to testify in our lead cases going to trial ...”) Plaintiff’s counsel affirmed this position to BNSF in a May 19th phone call regarding MacDonald’s case. Without testimony or evidence from Dr. Black, it is undisputed that there is no medical evidence supporting MacDonald’s assertion that he has an asbestos-related disease. **Exhibit A**, p. 3.

Compounding this, is the substantial amount of evidence demonstrating that MacDonald has normal, healthy lungs. Plaintiff admits that MacDonald’s pulmonary function testing show that he has normal lung function. **Exhibit A**, p. 3 (emphasis original) (“It is undisputed Jason’s most recent PFT confirms he has normal lung function.”) Likewise, the radiologists who have reviewed MacDonald’s CT scans have all found that there is no evidence of a lung condition or an asbestos-related illness. *See Exhibit B* (“There is no pleural thickening or pleural or diaphragmatic calcification present” ... “No significant pleural disease present”); **Exhibit C** (“No evidence for interstitial lung disease.”); **Exhibit D** (“No pleural based thickening or plaquing is noted” ... “No evidence for previous asbestos exposure”).

B. Medical or Expert Testimony is Necessary in Toxic Tort Cases.

Without Dr. Black or a medical expert, Plaintiff is unable to demonstrate the existence of a lung disease, let alone that such a condition is related to asbestos exposure. Montana law is clear that “expert testimony is required when the issue presented is sufficiently beyond the common experience of the trier of fact and the expert testimony will assist the trier of fact in determining the issue or understanding the evidence.” *Hinkle ex rel. Hinkle v. Shepherd Sch. Dist. No. 37*, 2004 MT 175, ¶ 35, 322 Mont. 80, 93 P.3d 1239 (“the development of ketoacidosis, Type I diabetes, and PTSD is beyond the common experience and understanding of the trier of fact.”); *see also*, *Cain v. Stevenson*, 218 Mont. 101, 105, 706 P.2d 128, 131, 1985 Mont. LEXIS 898, *7 (finding that expert testimony was not required where “the nature of the injury is such that laymen can plainly see, or infer from the injury, its cause and that it will be permanent, such as the loss of a limb. Respondent's back injury was not such an injury.”)

Toxic tort cases, like MacDonald's, clearly require expert testimony. Courts have widely held that a toxic tort plaintiff must adduce evidence of both general and specific causation. *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005)(citing *Raynor v. Merrell Pharms., Inc.*, 323 U.S. App. D.C. 23, 104 F.3d 1371, 1376 (D.C. Cir. 1997)(causation in toxic tort cases is discussed in terms of general causation and specific causation); *see also Johnson v. Arkema, Inc.*, 685 F.3d 452 (5th Cir. 2012); *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 836 (9th Cir. 2011); *In re Hanford Nuclear Reservation Litig. v. E. I. Dupont*, 292 F.3d 1124, 1133 (9th Cir. 2002). “General causation is whether a substance is capable of causing a particular injury or condition in the general population and specific causation is whether a substance caused a particular individual's injury.” *Norris*, 397 F.3d at 881. General causation is a predicate to specific

causation; a court cannot determine whether one defendant's exposure is a substantial factor to the plaintiff's disease until the plaintiff shows that the substance can generally cause the disease. *Brumbaugh v. Sandoz Pharm. Corp.*, 77 F. Supp. 2d 1153, 1155 (D. Mont. 1999).

Expert testimony is required to prove general and specific causation in toxic tort cases like Macdonald's. See *Gowdy v. Marine Spill Response Corp.*, 925 F.3d 200, 206-207 (5th Circuit, 2019) ("In toxic tort cases, expert testimony is often required."); *Whisnant v. United States*, 2006 U.S. Dist. LEXIS 80312, *5 (W.D. Wash.) ("Causation in toxic tort cases requires expert medical testimony to establish causation." (citing to *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, at 214-15)); *Seaman v. Seacor Marine L.L.C.*, 326 F. App'x 721, 729 (5th Cir., 2009) (holding that the plaintiff needed expert testimony to rebut the defense expert's opinion that second-hand smoke, rather than hazardous chemicals, caused the plaintiff's cancer); *Wills v. Amerada Hess Corporation*, 379 F.3d 32, 46 (2d Cir. 2004) (The Court found that expert testimony was needed on the question of whether exposure to toxic chemicals caused squamous cell carcinoma because that causal link was "sufficiently beyond the knowledge of the lay juror"); *Kolesar v. United Agri Prods., Inc.*, 412 F. Supp. 2d 686, 696 (W.D. Mich., 2006) (requiring the plaintiff to present expert testimony "because the effects of toxic chemical exposure are complex and not within the ken of ordinary experience"); See *Giglio v. Monsanto Co.*, 2016 U.S. Dist. LEXIS 101983, *3, 2016 WL 4098285 (S.D. Cal. 2016) ("Whether Roundup is capable of causing non-Hodgkin's lymphoma is a threshold issue on which all of plaintiff's claims rest, and competent expert testimony is generally necessary to establish causation in a personal injury action.")

The purported link between MacDonald's claimed exposures and his claimed illness are clearly outside the general knowledge of a lay person. Such a finding requires an analysis of (1)

whether MacDonald was exposed to a toxic substance; (2) whether the substance can cause the alleged disease; (3) whether the exposure occurred in a sufficient amount to cause the disease; and (4) whether the plaintiff actually has the disease. Here, there is no medical provider to even testify that the Plaintiff has a disease, let alone to link it to asbestos. As discussed above, MacDonald's failure to identify a treating doctor or medical expert to testify regarding general or specific causation leaves him unable to prevail at trial.

C. BNSF's Motion is ripe.

Although Plaintiff have not yet filed an expert disclosure in this matter, BNSF's Motion is ripe for consideration. James Kampf and Kelly Watson are two other asbestos claimants represented by opposing counsel in front of Judge Kutzman and Judge Pinski respectively. In both cases, Plaintiff's counsel withdrew Dr. Black as a witness, leaving Kampf and Watson without a treating physician to testify regarding causation. The plaintiffs in these cases eventually moved to dismiss and BNSF sought fees.

At oral arguments on this issue in April of 2020, Judge Pinski suggested that where there was no medical evidence of a disease, BNSF should file for summary judgment even if the deadline for expert witness disclosure had not passed.

22	You know, I did that, what, four months,
23	five months, give or take. After Judge Eddy lifts the
24	stay, why was there not a renewed motion for summary
25	judgment on causation at the time when you had all this

1 | overwhelming evidence that it was not an asbestos
2 | related diagnosis, and now the only evidence that linked
3 | it being Dr. Black is not even going to be presented by
4 | the Plaintiffs?

Exhibit F: 52:22-53:4 (Judge Pinski). Judge Kutzman likewise suggested that a motion for summary judgment should be filed where there was no medical testimony in support of an asbestos-related disease, even if the expert disclosure deadline had not passed:

25 | JUDGE KUTZMAN: -- they've got no expert, as

1 | far as you can tell, in September of 2019 --

2 | MR. DUERK: Yes.

3 | JUDGE KUTZMAN: -- so why not file a summary
4 | judgment motion and force the issue?

Id. 108:25-109:4.

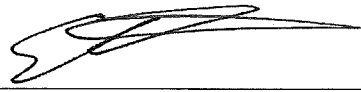
Here there is the similar situation to that faced by Judge Kutzman and Judge Pinski, where there is no medical evidence that the Plaintiff has an asbestos-related disease. As such, it is appropriate for BNSF to move for summary judgment, and for the Court to dismiss, if no such evidence is produced.

CONCLUSION

Based on the foregoing, Defendants BNSF & Swing respectfully requests that the Court grant summary judgment in this matter.

Dated this 7th day of July, 2020.

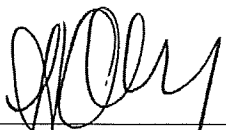
KNIGHT NICASTRO MACKAY, LLC

By: 
Anthony M. Nicastro
Steven T. Williams
*Attorneys for Defendants BNSF Railway
Company and John Swing*

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was sent via U.S. Mail to the Clerk of District Court and a copy was served upon the following counsel of record by U.S. Mail on this 7 day of July, 2020:

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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JASON C. MACDONALD,

Plaintiff,

vs.

BNSF RAILWAY COMPANY, et al.,

Defendants.

No. DDV-16-0549

PLAINTIFF'S RESPONSE TO BNSF'S
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

BNSF Railway Company ("BNSF") and Plaintiff agree Plaintiff Jason MacDonald has normal lung function. The parties also agree that no expert can opine to a reasonable degree of medical probability whether a plaintiff diagnosed with an asbestos related disease but having normal lung function will progress to severe disease, or not. As a result, Plaintiff's current damages are minimal and do not justify the cost of litigation of his case at this time. However, those damages could become significant in the future.

As such, Plaintiff has moved to amend his Complaint to remove any allegations of current damages and also supports the filing of MHSL Plaintiffs' *Motion for Claim Registry for Plaintiffs Willing to Forgo Claims for Present Damages* ("Registry Motion"). See **Exhibit A; Exhibit B**

(BNSF's response thereto); **Exhibit C** (Plaintiffs' reply in support). The *Registry Motion* currently pending before the Asbestos Claims Court would alleviate the Courts' litigation burden associated with cases in which a plaintiff, with a latent slow progressing disease, does not wish to pursue his/her current damages but instead would like to preserve his/her claim in the event that disease progresses to a point justifying litigation. Otherwise, Plaintiff's constitutional rights to be made whole, due process, and other rights are lost. Plaintiffs' proposed Registry, and accompanying dismissal of present damages with prejudice, offers an obvious immediate financial benefit to Defendants. The State of Montana, Stimson Lumber Company, Robinson Insulation Company, and International Paper Company do not oppose that *Registry Motion*.

BNSF objects to that solution and instead wishes to litigate such cases, like this case, in a premature adjudication that deprives Plaintiff of his constitutional rights. BNSF's *Motion for Summary Judgment* highlights these deficiencies. In response, this Court should use its equitable and remedial authority to:

- 1) Deny BNSF's *Motion for Summary Judgment* and stay this case pending resolution of MHSL Plaintiffs' fully briefed *Registry Motion* currently pending before the Asbestos Claims Court; or
- 2) Enter an order dismissing this case, without prejudice, and finding that Plaintiff's statute of limitations is preserved so that Plaintiff may refile his case in the future.

FACTUAL BACKGROUND

Plaintiff Jason MacDonald is 43 years old and was born and raised in Libby, Montana. He played baseball from an early age of 8 starting with Little League and eventually becoming a star high school player for the local American Legion team. His brother and sister played baseball too. His mother volunteered at the concession stand. As a result, the family would spend nearly every

day during baseball season at the baseball fields adjacent to BNSF's downtown Libby Railyard (eating many dinners out of the family's cooler). Jason played in the asbestos containing piles on BNSF's downtown Libby railyard right-of-way. He also walked across the downtown Libby railyard to watch baseball games being played on the other side of the tracks. He walked daily on the BNSF railroad right-of-way to access a popular swimming hole during the summers in high school too. Additionally, Jason's father worked for the local lumbermill for his entire career. Jason also worked at the local lumbermill during his first two summers after high school while he was attending college. **Exhibit D** (Declaration of Jason MacDonald), ¶ 2. All of these activities represent prominent pathways to significant asbestos exposure. *See generally* Peipins, et al., (2003) "Radiographic Abnormalities and Exposure to Asbestos-Contaminated Vermiculite in the Community of Libby, Montana, USA," *Env Health Persp*, 2003, 111:14, 1753-59.

Jason is now, and has been for the past 19 years, a schoolteacher and coach in Alaska. Due to his growing up in Libby, Jason went to the CARD Clinic to participate in the public health screening for asbestos disease. Jason was diagnosed with a non-malignant asbestos related disease ("ARD") on July 17, 2013. To preserve his statute of limitations, Jason filed the present action on June 22, 2016. Jason's current pulmonary function is "normal." **Exhibit D** (Declaration of Jason MacDonald), ¶ 2.

It is undisputed there is highly toxic asbestos in and around Libby, Montana. With respect to BNSF's properties, the Montana Supreme Court has found in EPA's Initial Pollution Report for BNSF's downtown Libby railyard that:

1. "Asbestos contaminated materials were hauled and shipped through the [BNSF] railyard, and spilled into the soil for decades;"
2. "Analytical results have shown asbestos levels in soil from 2-5%" in the railyard;

3. “Baseline monitoring along the track conducted by BNSF has found the highest concentrations measured during the sweeping ranges from 7 to 14 f/cc in air;” and
4. “Visible unexpanded vermiculite remained at Tracks #1, #2 and #3.”

BNSF Railway Co. v. Asbestos Claims Court, 2020 MT 59, ¶ 4, 399 Mont. 180, 459 P.3d 857.

Importantly, the Montana Supreme Court noted these measurements were taken “at least a decade after the vermiculite mining operations in Libby had ceased, and after BNSF had attempted to excavate and remediate the property.” *Id.* The Montana Supreme Court stated, “although BNSF cherry picks the record to cite to isolated favorable test results, it is beyond dispute that extensive asbestos existed, at high levels, on BNSF’s properties.” *Id.*, ¶ 23.

In affirming the Asbestos Claims Court’s finding of BNSF’s abnormally dangerous activity in *Barnes v. BNSF*, the Montana Supreme Court found those facts from the EPA important as well as the fact BNSF’s railyard is located in downtown Libby:

Indeed, it is especially relevant that BNSF’s railyard was located in downtown Libby and its tracks ran through the town, where Plaintiffs, as citizens of Libby, are claiming they were injured by exposure to asbestos while conducting their daily activities.

Id., ¶ 34. As a result, the Montana Supreme Court held “BNSF’s handling of asbestos under the facts presented here constitutes an abnormally dangerous activity for which BNSF is strictly liable.” *Id.*, ¶ 39.

PROCEDURAL BACKGROUND

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 ARD and had normal or mild lung function as evidenced in pulmonary function tests (“PFT”).

The Asbestos Claims Court granted Plaintiff's request for a deferred docket. *See Exhibit E* (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.

Exhibit E (Deferred Docket Order), p. 9. The Asbestos Claims Court further stated:

In these cases [of normal or mild impairment], 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.

Exhibit E (Deferred Docket Order), p. 10.

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.

Exhibit E (Deferred Docket Order), p. 16 (footnotes omitted). After creating the Deferred Docket, Plaintiff's case was placed on the Deferred Docket.

On October 5, 2018, BNSF filed its *Motion Seeking Active Status*. 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.

See **Exhibit F** (December 19, 2018 Order).

On December 21, 2018 this Court entered an *Order Setting Scheduling Conference*. Thereafter, on January 15 and 18, 2019, the Asbestos Claims Court entered its orders on summary judgment in *Barnes v. BNSF* (case with nearly identical liability issues as this case), for which BNSF sought supervisory control from the Montana Supreme Court. As a result, the Court vacated the *Order Setting Scheduling Conference* in this case pending BNSF's appeal.

On March 11, 2020, the Montana Supreme Court entered its *Opinion* in BNSF's appeal. Two days later, on March 13, 2020, BNSF filed its *Motion for Scheduling Conference* in this case. Despite not having any scheduling conference or resulting scheduling order, BNSF has since taken three depositions, including that of Jason's parents who both confirmed Jason is unaffected by his undisputed "normal" impairment:

Q. Okay. And these things, hunting and fishing, those are things that he's continued to do even after his diagnosis, to your knowledge?

A. Yes.

Q. Okay. Have there been any -- Are you aware of any physical difficulties he's had since being diagnosed with an asbestos-related disease?

A. No.

Q. Okay. Has Jason ever explained to you about physical difficulties or not being able to do something he used to be able to do?

A. No.

Q. Is it your understanding he doesn't have any physical symptoms currently?

A. Yes.

Q. Okay. Nothing that he used to do that he can't do now?

A. I think he's okay to do whatever.

See **Exhibit G** (Depo. Kelly MacDonald (Jason's Father), 50:5-22; accord Depo. Julie MacDonald (Jason's Mother), 38:18-39:16). BNSF has also served 51 interrogatories and 60 requests for production, to which Jason has responded, and conducted Jason's deposition. **Exhibit D** (Declaration of Jason MacDonald), ¶ 3.

Jason does not want to litigate any current minimal damages and incur the costs related to such litigation, which would be done with the attendant risk that he may not yet be able to prove his disease to a reasonable degree of medical probability. He simply wishes to preserve his right to a remedy should his asbestos disease progress to a disabling manifestation like many of his family members. **Exhibit D** (Declaration of Jason MacDonald), ¶ 4. The other party to Jason's case, International Paper ("IP") agrees that there is no need for this case to be litigated at this time.

Thus, IP came forth with a common-sense solution: dismissal without prejudice and a tolling agreement to which Jason was agreeable. The Court has since entered an *Agreed Order of Dismissal* in that regard. Nevertheless, BNSF wants to actively and prematurely litigate this case into a dismissal with prejudice in violation of Jason's constitutional rights.

ARGUMENT

I. Forcing Plaintiff to a premature adjudication solely because he was required to file an action to protect his statute of limitations would deprive him of his constitutional rights.

Asbestos cases, which involve a latent disease process that develops over the course of many years after the injurious exposure, present an exceptional circumstance. A victim of asbestos exposure may have no symptoms or medical findings of asbestos disease for decades, and then may not have disabling disease for many years after the initial diagnosis—if ever. The result is that these cases create a special question at the intersection of two principles, which are reflected in statute of limitations and the right to adjudication on the merits. The Asbestos Claims Court has recognized the resultant dilemma:

Further complicating the diagnosis is the fact that the latency period appears to extend well past 40 years, and even after a diagnosis, there is no way to predict whether the patient will develop symptoms and/or any impairment related to the disease. As such, and the parties concede, no one can establish to a reasonable degree of medical certainty which unimpaired Plaintiff's disease will or will not progress.

Exhibit E (Deferred Docket Order), p. 3.¹

Essentially, the issue raised by BNSF's *Motion for Summary Judgment* is whether Plaintiff, who has a latent, progressive and unpredictable disease, should be deprived of adjudication of a

¹ All emphasis herein is added.

potential future serious injury claim on its merits. No court has permitted such a result. One reason is that it flies in the face of the most fundamental characteristics of a judicial system. Few things are more fundamental to the administration of justice than providing a litigant the opportunity to present his cause before final judgment is entered thereon. Such a result would violate constitutional protections. Adjudication of this case implicates fundamental constitutional concerns including rights to be made whole, due process, and to equal protection. These constitutional concerns are discussed below.

A. Art. II, §16 of the Montana Constitution guarantees Plaintiff a Constitutional right to a remedy for all elements of damage compensable under the substantive law of Montana.

The first controlling constitutional rule is the right to be made whole guaranteed by Art II, § 16 of the Montana Constitution. In the *Deferred Docket Order*, the Asbestos Claims Court found the right to an adjudication of actual damages before those damages can be evaluated denies this right because “these Plaintiffs likely cannot recover future damages for the risk of future injury.” Exhibit E (*Deferred Docket Order*), p. 12.

This ruling reflects the Montana Supreme Court’s articulation of the essential requirements of this right to a “remedy afforded for every injury of person.” Montana Constitution, Art. II, §16. The leading case construing the meaning of this provision is *Meech v. Hillhaven, Inc.* (1989), 238 Mont. 21, 776 P.2d 488, which held that, while not constraining what the courts or legislature may determine to be the elements of a cause of action or the remedies therefor, the courts of Montana must provide the vehicle to adjudicate all such causes of action and remedies.

[T]he guarantee of a “speedy remedy” in the first clause of Article II, § 16, means such remedy as is provided by law. This “full legal redress,” following the guarantee of a speedy remedy, refers to the equal right to be made whole again by what the law defines as a cause of action and its elements.

Meech, 238 Mont. at 37, 776 P.2d at 498.

The elements of a cause of action for asbestos injuries and relief therefor, under the substantive law of Montana, are indisputable. Section 27-1-701, MCA, (“everyone is responsible ... [for] willful acts [and] injury occasioned to another by his want of ordinary care”); Section 28-1-201, MCA; Section 27-1-202, MCA, (“Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefore in money, which is called damages”).

Given this clear substantive law, the courts are constitutionally constrained to provide each plaintiff the judicial opportunity to secure the monetary damages for injuries caused by negligence, and in this case also the strict liability, of a defendant. Forcing Plaintiff to a premature adjudication of injury that has not yet occurred and is not judicially measurable would deprive him of the right guaranteed by Art. II, §16 – that is unless a second opportunity to remedy later injuries is preserved, because the consequence of such deprivation is quantitatively profound.

B. The guarantees of due process in Amend. XIV, § 1, U.S. Constitution, and Art. II, § 17, of the Montana Constitution would be violated if Plaintiff was forced to a premature adjudication.

Art. II, §17 of the Montana Constitution guarantees that no “person shall be deprived of life, liberty, or property without due process of law.” Similarly, the Fourteenth Amendment to the U.S. Constitution provides, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

The Montana Supreme Court has recognized that sufficient protection of due process requires procedures tailored to the demands of a particular situation, here the unusual intersection of statute of limitations and latent disease which has not yet manifested in what will be the most significant adjudicable injury. The Montana Supreme Court articulated three factors for this

flexible analysis in *Goble v. Montana State Fund*, 2014 MT 99, ¶ 46, 374 Mont. 453, 325 P.3d 1211:

“Due process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (internal quotation marks and citation omitted); *Wheelsmith Fabrication, Inc. v. Mont. Dept. of Labor & Indus.*, 2000 MT 27, ¶ 17, 298 Mont. 187, 993 P.2d 713. Specifically, procedural due process requires consideration of three distinct factors: “(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest.” *M.C. v. Dept. of Insts.*, 211 Mont. 105, 109, 683 P.2d 956, 958 (1984) (citing *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903).

Goble, ¶ 46. Here, the tailoring of the procedures required by due process should preserve the notice and evidence preservation concerns of statute of limitations as well as the reasonably timely adjudication right of all litigants. Similarly, the tailoring must recognize that there is no due process right to an immediate adjudication. There certainly is no due process right to adjudication and preclusive judgment on the merits before fair adjudication on the merits of Plaintiff's claim for full legal redress is possible. Rather, timeliness is evaluated in terms of when a case is ripe for adjudication.

A judicial ruling that will have a final and preclusive effect that prevents there ever being an adjudication on the merits of an injury claim (i.e., per *Goble* “an erroneous deprivation of such interest through the procedures used”) should be avoided at all costs because the “demands” of the circumstances must be the preservation of rights to the extent possible. *Goble*, supra. Here, BNSF's *Motion for Summary Judgment* seeks to deprive Plaintiff of his constitutional rights to due process and to be made whole. This Court can ensure those rights are protected by either 1) denying BNSF's *Motion for Summary Judgment* and staying this case until the Asbestos Claims

Court rules on MHSL Plaintiff's *Registry Motion*, or 2) dismissing Plaintiff's case without prejudice and making the affirmative finding that Plaintiff's statute of limitations is preserved. Per *Goble*, "the probable value, if any, of additional or substitute procedural safeguards" such as these is manifest.

C. Other constitutional rights may be impaired by BNSF's catch-22 *Motion for Summary Judgment*.

1. Right to jury trial on each element of claim.

A plaintiff is entitled to a jury trial of each element of his/her claim under the Montana Constitution's right to jury trial. Mont. Const., Art. II, §26; *Britton v. Farmers Ins. Grp.* (1986), 221 Mont. 67, 93, 721 P.2d 303, 319. This right would be impaired if a motion for summary judgment takes away a triable fact issue before the evidence has arisen. *Id.* Forcing Plaintiff to a final adjudication of all damages before (a) he is able to present evidence on damages not yet incurred, and (b) the jury is able to evaluate the Plaintiff's claims for those damages, would deprive Plaintiff of the "inviolable" jury trial right in Art. II, §26.

2. Right to equal protection.

Art. II, §4 of the Montana Constitution and the Fourteenth Amendment to the U.S. Constitution guarantee "the equal protection of the laws." This constitutional protection requires an examination of whether the disparate application of state law between classes of individuals is "reasonable in light of its purpose ...[or] there is an arbitrary or invidious discrimination between those classes." *McLaughlin v. State of Fla.*, 379 U.S. 184, 191 (1964); *see also, Brewer v. Ski-Lift, Inc.* (1988), 234 Mont. 109, 113, 115, 762 P.2d 226, 229, 230; *Oberson v. U.S. Dept. of Agriculture*, 2007 MT 293, 339 Mont. 519, 171 P.3d 715.

For example, at issue here are two classes of claims:

1. Claimants who currently have complete and knowable damages that can be proven to a reasonable degree of medical probability; and
2. Claimants who do not yet know the full extent of their damages because those damages have not yet accrued and cannot be proven to a reasonable degree of medical probability.

The first class of plaintiffs will receive a jury award for all of their damages while the second class of plaintiffs, including potentially Jason MacDonald, will be forced to a premature adjudication and not receive any remedy. There is no purpose, let alone a rationally defensible one, for the denial of equal protection to asbestos victim plaintiffs just because their disease progression occurs later than or slower than otherwise identically situated plaintiffs.

II. This Court should deny BNSF's Motion for Summary Judgment and stay this case pending resolution of MHSL Plaintiffs' fully briefed Registry Motion currently pending before the Asbestos Claims Court.

As can be seen from this case, BNSF wants to immediately pursue "mild" impairment cases as the damages in those cases do not justify the substantial costs associated with trial. BNSF's *Response to Registry Motion* highlights its basis for its strategy:

Notably, the waiving of present damages is generally of minimal value in a toxic tort case compared to the overall damages sought, as most of the damages relate to projected pain and suffering and the claim that the alleged illness is terminal.

...Watson's life care planner had, in 2016 before Watson developed cancer and was only alleging a [severe impairment] non-malignant ARD, found damages would range from \$685,328 and \$1,566,419.

Exhibit B (BNSF's Response), pp. 20-21. It is apparent BNSF intends to litigate "normal" and "mild" cases, as BNSF knows that future damages are inherently difficult to prove at that early stage meaning the case itself carries minimal risk of large damages, unlike a severe impairment case. This is in contrast to the Asbestos Claims Court's stated purpose of reserving the Court's

and the parties' limited resources for lead cases, or at least until such time as a plaintiff's disease progresses to a more severe disease stage with accompanying significant damages.

The Registry provides the solution. It is in accord with the Montana Supreme Court's instruction that "the probable value, if any, of additional or substitute procedural safeguards" be considered in "crafting" the procedural safeguards that "the particular situation demands." *Goble*, ¶ 46, citing *Mathews v. Eldridge*, 424 U.S. 319, 334. It is important to understand the difference between the Deferred Docket and the proposed Registry. In creating the Deferred Docket, the Asbestos Claims Court was considering pending actions which alleged claims of current injuries. Thus, there was a competing concern of a Defendant's right to timely litigation of the current injury claim. The *Registry Motion* seeks a mechanism which will allow a Plaintiff to forego a claim for current injuries that are insufficient to warrant the expense of litigation, while (a) preserving the claimants' due process rights to a remedy for future injuries, and (b) fulfilling the notice purposes of the statute of limitations. MHSL Plaintiffs brought the *Registry Motion* on behalf of hundreds of claimants who would dismiss their claims for current injuries with prejudice so long as the statute of limitations is preserved should they sustain serious damage. Notably, in terms of the interests of judicial efficiency, the dockets in the Montana Courts will be thus cleared of a large majority of cases, and for many, if not most of the claimants, no case will ever be refiled. The Registry would also prevent the filing of many cases.

Here, as the Asbestos Claims Court has previously ruled, the parties agree no expert can opine whether a plaintiff will progress, which thereby undisputedly makes any current claim for such damages speculative:

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.

Exhibit E (Deferred Docket Order), p. 10

Without those future damages, litigation of Plaintiff's case at this time comes with the risk of extraordinary expenses with little return. As evidenced by Plaintiff's *Motion to Amend* and MHSL Plaintiff's *Registry Motion*, Plaintiff does not wish to pursue his current nominal damages for his normal impairment ARD at this time. He is withdrawing his allegations of current damages, with the hope of preserving the option of asserting a claim for catastrophic damages in the unfortunate event that they arise in the future.

Because it is somewhat analogous, Mont. R. Civ. P. 56(f) provides support for the situation at hand:

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken;
- or
- (3) issue any other just order.

Mont. R. Civ. P. 56(f). On this additional basis, the Court should deny BNSF's *Motion for Summary Judgment*. Mont. R. Civ. P. 56(f)(1). Because BNSF is intent on litigating this case, having already taken four (4) depositions, conducted written discovery, filed the present motion, etc., the Court should stay this case pending the Asbestos Claims Court's consideration of the fully briefed *Registry Motion*.

III. Alternatively, this Court should enter an order dismissing this case, without prejudice, and finding that Plaintiff's statute of limitations is preserved so that Plaintiff may refile his case in the future.

Critical in Jason MacDonald's case are the following facts: 1) there is highly toxic asbestos in Libby and Jason had significant exposures thereto by growing up in Libby, including playing baseball adjacent to BNSF's downtown Libby railyard since 8 years old until eventually becoming a high school star player, 2) there is a great risk of harm due to exposure to that asbestos, 3) through being screened at the CARD Clinic, he was diagnosed with a non-malignant ARD, 4) no expert can opine whether a given individual such as Jason will progress.

BNSF uses the CARD diagnosis as both a shield and a sword:

In the past, Plaintiffs have correctly stated that a positive screening from CARD triggers the statute of limitations. However, the statute then specifically sets forth a three-year period in which a party is to investigate his or her claim and support it with sufficient admissible evidence. Based on the facts cited above, a CARD screening does not qualify as a reliable diagnosis consistent with accepted medical criteria and therefore fails to meet that burden.

Exhibit H (BNSF's Renewed Motion for Show-Cause Order Related to a CARD Diagnosis of ARD), p. 9. Simply stated, BNSF attempts through its duplicitous maneuver to wrestle its way into an obviously unfair advantage—contending as it has in the past that “a CARD screening does not qualify as a reliable diagnosis consistent with accepted medical criteria”; and also “that a positive screening from CARD triggers the statute of limitations.”

Likewise, BNSF alleges such cases should be dismissed with prejudice and with no leave to refile in the event a plaintiff gets re-diagnosed with a non-malignant ARD or their disease progresses to the point they incur substantial damages:

To this point, it is Defendant's position that any individuals who were diagnosed solely by the CARD Clinic do not have legitimate diagnoses. The remedy in these cases, where there is no additional medical evidence, is to truly dismiss the plaintiffs' claims with

prejudice – not to allow for dismissal with leave to refile years or decades later, as the Plaintiffs are suggesting. In instances where a plaintiff cannot obtain a medical diagnosis from a credible medical provider, the only appropriate remedy is for these cases is for the cases to be dismissed based on a lack of medical evidence.

Exhibit B (BNSF's Response), pp. 15-16. In short, BNSF advances the untenable and unjust position that, what BNSF purports is an invalid diagnosis: 1) should still be the basis for asserting a preclusive statute of limitations defense resulting in outright dismissal and 2) should also serve as a bar to bringing a future claim regardless of its nature.

BNSF's position is not supported by common sense, fair play, or the fundamental tenants underlying Plaintiff's constitutional rights. It would deprive Plaintiff of his rights to full legal redress, due process, and equal protection. This Court should not countenance BNSF's position. Instead, the Court should exercise its inherent equitable authority and enter "any other just order." Mont. R. Civ. P. 56(f)(3). Plaintiff submits that such order would be to deny BNSF's *Motion for Summary Judgment* and stay this case pending resolution of MHSL Plaintiffs' fully briefed *Registry Motion* currently pending before the Asbestos Claims Court; or a dismissal without prejudice and the finding that Plaintiff's statute of limitations is preserved so that Plaintiff may refile his case in the future should his damages warrant litigation.

CONCLUSION

For the reasons stated herein and pursuant to this Court's inherent equitable authority and Mont. R. Civ. P. 56(f), Plaintiff respectfully requests the Court either:

- 1) Deny BNSF's *Motion for Summary Judgment* and stay this case pending resolution of MHSL Plaintiffs' fully briefed *Registry Motion* currently pending before the Asbestos Claims Court; or

2) Enter an order dismissing this case, without prejudice, and finding that Plaintiff's statute of limitations is preserved so that Plaintiff may refile his case in the future.

Respectfully submitted this 31st day of July, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with L.R. 7.C., and that based upon the word count of Plaintiff's word-processing system, excluding the caption, certificates of mailing and compliance, signature lines, and attachments, this brief contains 5,210 words (less than 6,500 words).

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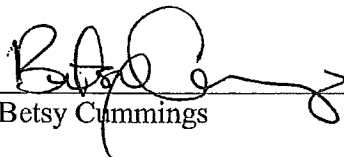
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Dated: 07-13-2021