APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 18-0693

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

Petitioner,

v.

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

Respondent.

ORDER

[Filed: March 12, 2019]

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

The cause underlying this Petition is a 2014 bad faith claim filed by Dannels against BNSF. Dannels

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

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

BNSF's Supplemental Answer to Interrogatory No. 5:

> BNSF Claims Department currently runs thousands of reports each year. While some of these reports are run on a set schedule and retained in a central location, with set distribution lists, numerous Claims Department employees are able to run reports on their own and thousands of potentially responsive ad hoc reports are run each year. Providing the information requested would require an inquiry to all Claims Department employees with the ability to run reports in order to gather the requested information and take hundreds of hours of additional time.

> BNSF is working to identify whether it routinely runs any reports containing information about claims made by injured employees and the outcome of these claims. Discovery will be supplemented in accordance with the Rules of Civil Procedure.

BNSF never supplemented this response further.

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

> BNSF incorporates its response to Interrogatory No. 5 as though fully set forth. It is not possible to disclose any reports identified in Interrogatory No. 5 without extensive redactions because the reports contain confidential settlement information, personal or confidential information of individuals not a party to this suit and other confidential and proprietary information. BNSF's review of this information is ongoing and it will supplement this response with a privilege log if any documents are identified.

Following receipt of these responses, Dannels scheduled depositions of three experts identified by BNSF: Charles Shewmake (BNSF's former general counsel and Vice President of Claims), Rick Lifto (former Assistant Vice President of Claims), and Eric Hegi (current Assistant Vice President of Claims). Hegi was also identified by BNSF as its Rule 30(b)(6) designee.[1] During the depositions, Dannels learned

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

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

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

On February 22, 2018, the District Court issued an Order on Dannels' Motion to Compel. The District Court found BNSF had waived work-product privilege because its expert witnesses had unfettered access to the information, including information BNSF unjusti-

fiably withheld from production, and that BNSF's actions precluded Dannels from meaningfully cross-examining these witnesses. The District Court ordered BNSF to produce: "all documents" directly related to the handling, evaluation, and settlement of Dannels' underlying claim, except those documents that "legitimately meet" the definition of attorney-client privilege; to specify documents or redactions on a privilege log; to highlight portions of documents for which BNSF asserted attorney-client privilege; the monthly summary reports over the last twenty years; and documents showing methods and criteria used for reserving or accruing losses related to FELA claims since Berkshire Hathaway purchased BNSF.

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

> (A) All actuarial reports of Willis Towers Watson (including its predecessors and successors) from 2010 to date relating to FELA claims, including risk financing, results expected and obtained, and insurance;
>
> (B) All annual executive slide presentations on FELA claims, as identified in the deposition of Dione Williams, from 2010 to date; and

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

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

Pretrial discovery disputes are typically not appropriate for an exercise of supervisory control. As we have previously noted, "[i]t is not our place to micromanage discovery . . . ." *Mont. State. Univ.-Bozeman v. Mont. First Jud. Dist. Ct.,* 2018 MT 220, ¶ 17 n. 12, 392 Mont. 458, 426 P.3d 541 (internal quotation omitted). Nonetheless, this Court will sparingly exercise supervisory control over interlocutory discovery matters under truly extraordinary circumstances where the lower court is proceeding under a demonstrable mistake of law and failure to do so will place a party at a significant disadvantage in litigating the merits of the case. Mont. State. Univ.-Bozeman, ¶ 17 n. 12; *Hegwood v. Mont. Fourth Jud. Dist. Ct.,* 2003 MT 200, ¶ 6, 317 Mont. 30, 75 P.3d 308.

In its Petition, BNSF first argues the Sanctions Order is void because FELA preempts Dannels' underlying bad faith claim. BNSF urges this Court to overrule *Reidelbach v. Burlington N & Santa Fe Ry. Co.,* 2002 MT 289, 312 Mont. 498, 60 P.3d 418, in which we rejected this very argument. This is BNSF's second attempt at raising FELA preemption as a basis for supervisory control in this case. As we concluded

in our February 20, 2018 Order denying BNSF's previous Petition for Writ of Supervisory Control, applying existing precedent is not a "mistake of law," and we see no reason why a normal appeal is an inadequate process for addressing BNSF's request to revisit our holding in *Reidelbach*. *See* M. R. App. P. 14(3).

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

BNSF maintains the sanction of default is arbitrary because the documents compelled by the Sanction Order were not sought by Dannels in his motion to compel. A district court has broad discretion when assessing what is encompassed in a discovery request. *See Richardson v. State,* 2006 MT 43, ¶¶ 51-52, 331 Mont. 231, 130 P.3d 634. This issue may properly be reviewed on direct appeal under an abuse of discretion standard. *See Smith,* 276 Mont. at 332-33, 916 P.2d at 92-93. BNSF fails to convince us that the District

Court made a purely legal error, and we are satisfied an appeal would afford BNSF an adequate remedy. *See* M. R. App. P. 14(3); *see also Bullman v. Curtis,* 2011 Mont. LEXIS 449, at *4-5, 362 Mont. 543 (Aug. 9, 2011).

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

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

BNSF also alleges that the monthly reports contain privileged attorney-client information, including cases which are currently being litigated. Dannels responds that the monthly reports pertain only to closed cases and Dannels does not seek documents pertaining to active litigation. BNSF has not demonstrated that the District Court is proceeding under a demonstrable mistake of law and that failure to grant supervisory control will place BNSF at a significant disadvantage in litigating the merits of the case. *See Mont. State. Univ.-Bozeman,* ¶ 17 n. 12. We reiterate that the District Court, that has been intimately involved in this matter, was in the best position to enforce discovery rights and limits and to assess and sanction discovery abuses. *See Ascencio v. Halligan,* 2019 Mont. LEXIS 77, at *2-3 (Feb. 19, 2019); *Richardson,* ¶ 21; *Smith,* 276 Mont. at 332, 916 P.2d at 93.

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

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

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

Dated this 12th day of March 2019.

s/ Mike McGrath
Chief Justice
s/ James Jeremiah Shea
s/ Ingrid Gustafson
s/ Beth Baker
s/ James Rice
Justices

Justice Laurie McKinnon dissents from the Court's Order.

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

First, the facts and circumstances of *Reidelbach* are distinguishable from those here. In *Reidelbach,* the parties had neither settled nor tried the FELA claims. Based on BNSF's negotiations and representations, Reidelbach believed BNSF would compensate him adequately without the need to pursue a FELA action. Later, when the expected damages did not materialize, Reidelbach brought his state law bad-faith claims in conjunction with his FELA claims. Here, in contrast, Dannels sued BNSF under FELA in 2013, and a jury awarded Dannels $1.7 million. BNSF fully satisfied that amount, and the FELA case concluded. A year later, Dannels filed this second lawsuit arising from the same injuries and now alleges BNSF violated

the UTPA when it defended the FELA action. More particularly, Dannels alleges BNSF's misconduct caused him emotional distress and requests punitive damages—relief which FELA does not allow. In both petitions requesting this Court exercise supervisory control, BNSF urged the Court to overrule or reconsider *Reidelbach* and find preemption of Dannels' state-law claims under FELA.

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

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

APPENDIX B

Katherine M. Bidegaray
District Judge, Department 2
Seventh Judicial District
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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

ROBERT DANNELS, Plaintiff, vs. BNSF RAILWAY COMPANY, NANCY AHERN, and JOHN DOES 1 THROUGH 10, Defendants.	Cause No. BDV-14-001 Honorable Katherine Bidegaray **CORRECTED ORDER ON SANCTIONS** [Filed: November 16, 2018]

INTRODUCTION[1]

On January 18, 2018, Plaintiff Robert Dannels ("Dannels") filed a Motion to Compel, Motion for Sanctions, and Brief in Support. (Dkt. 184) In his Motion to Compel, Dannels requested the imposition of sanctions *(Id.).* On February 5, 2018, Defendants ("BNSF" and "Ahern") filed their answer brief. (Dkt. 200) On February 9, 2018, Dannels filed his reply brief (Dkt. 202) and a Notice of Supplemental Authority, providing the February 5, 2018, Order and Memorandum in the FELA case of *Scott Kowalewski v. BNSF,* Cause No. 27-CV-17-145, in the District Court of the Fourth Judicial District, State of Minnesota, County of Hennepin, granting sanctions against BNSF for discovery abuses. (Dkt. 203) The Court heard oral argument on the motion on February 12, 2018; and ruled on the discovery issues implicated by Dannels' Motion to Compel on February 22, 2018. (Dkt. 216)[2]

On March 27, 2018, Dannels filed the Affidavit of Dennis Conner Detailing Deficiencies with Defendants' Compelled Discovery (Dkt. 245) and the Affidavit of James' R. Conner with Attached Orders (Dkt. 246). On April 6, 2018, Defendants filed their Response to Plaintiffs Request for Sanctions (Dkt. 250), the Declaration of Robert J. Phillips (Dkt. 251), and Defendants' Proposed Order on Plaintiff's Motion for Sanctions (Dkt. 249 and 253). On April 9, 2018, Dannels filed Plaintiffs Reply Brief in Support of Request for Sanctions. (Dkt. 255)

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[1] The original version of this Order inadvertently omitted page 14.

[2] Though issued February 22, 2018, the order was filed February 23, 2018.

On April 18, 2018, at Defendants' request, the Court held an evidentiary hearing on Dannels' Motion for Sanctions. Defendants called three witnesses, and the parties offered exhibits as reflected in the record. After the hearing, the Court ordered the parties to submit proposed orders regarding sanctions. The parties did so. On May 7, 2018, Defendants filed their proposed Findings of Fact, Conclusions of Law, and Order. (Dkt. 259) On June 28, 2018, Dannels filed Plaintiff's Notice of Supplemental Authority, providing the Court the Memorandum Decision and Order on a Motion to Compel in *Sherwood v. BNSF Railway* Co., Case No. 1:16-cv-00008-EJL-REB, decided on May 18, 2018, U.S. District Court of Idaho. (Dkt. 260) The Court is now prepared to rule.

FACTUAL BACKGROUND

This case arises out of the handling of an FELA claim brought by Dannels against Defendant Burlington Northern Santa Fe Railway Company ("BNSF"). Dannels was employed by BNSF when he suffered an on-the-job disabling injury on March 17, 2010. On December 6, 2010, Dannels sued BNSF under the FELA. Dannels' FELA case was tried before a jury and, on February 13, 2013, the jury returned a $1,700,000 verdict for Dannels. On June 26, 2013, Dannels settled his claim with BNSF for $1,700,000. Dannels filed the present bad faith case on January 2, 2014.

In this case, Dannels alleges Defendants' breached duties of good faith owed him under § 33-18-201, MCA, and Montana's common law to handle his claim fairly and in good faith. He alleges that, by intentional acts or omissions, Defendants caused him emotional distress. Dannels also claims BNSF acted with malice and fraud and that punitive damages

should be assessed because of its systematic scheme to:

(a) Cause delays and make litigation expensive to emotionally and financially affect injured employees to a point where they settle for less than a fair amount;

(b) Avoid fair and equitable settlement of FELA claims;

(c) Drive out competent legal representation for injured employees by making claims too stressful and time-consuming for attorneys to represent injured railroad employees; and

(d) Maximize profits by investing FELA injury claim reserves and premiums as long as possible to achieve the greatest return on those investments.

Dannels seeks compensatory damages on his statutory and common law bad faith and intentional infliction of emotional distress claims, and punitive damages because of BNSF's alleged fraud and malice.

Under this Court's March 6, 2015, Scheduling Order pretrial deadlines were set with the trial to begin on June 20, 2016. Dannels served written discovery on the Defendants in August 2014. In part, Dannels sought training and educational information regarding BNSF's claims handling practices, information about the FELA claim investigation and handling, the relationship between BNSF and its insurance companies, and the entire claim file from the underlying FELA claim. In Interrogatory No. 5, Dannels asked whether "BNSF generate[s] any types of reports containing information about claims made by injured

BNSF workers and the outcome of their claims." Dannels asked BNSF to identify and produce each such report utilized over the past 15 years. See Interrogatory No. 5 and Request for Production No. 7. Defendants did not respond to Plaintiffs written August 2014 discovery until May 2015.

In response to Dannels' first set of written discovery requests, Defendant Ahern produced what purported to be the underlying claim file. However, BNSF objected to nearly every discovery request and failed to provide any meaningful information. BNSF did not identify or produce a single report in response to Interrogatory No. 5 and Request for Production No. 7. Instead, BNSF objected to the discovery requests under two prevailing theories—privilege and general boilerplate objections. Dannels filed a motion to compel discovery.

On November 12, 2015, Dannels moved to vacate the pretrial deadlines until after the Court had the opportunity to rule on outstanding discovery disputes. On November 30, 2015, pretrial deadlines were set with the trial scheduled for October 3, 2016. The parties were warned that they must effectively participate in and complete all specified pretrial activities in good faith under threat of sanctions. On April 18, 2016, via a joint motion, the Court vacated the scheduling deadlines to permit the Court an opportunity to rule on the outstanding motions. The trial date was delayed a third time and reset for October 16, 2017.

By an order, dated January 26, 2017, the Court ruled on Dannels' motion to compel, specifically examining a number of discovery requests and BNSF's responses to them. (Dkt. 64) The Court found most of BNSF's objections baseless. With respect to the privilege objections, the Court ordered BNSF to produce

all its work product, including opinion work product by its personnel. The Court overruled the boilerplate objections and ordered that BNSF meaningfully respond to Dannels' discovery requests. The Court specifically ordered BNSF to answer Interrogatory No. 5. (Dkt. 64, p.p. 13-14)

The Court noted the delay this case experienced in discovery. The Court found "that a substantial factor for the delay has been the defendants' conduct." (Dkt. 64, p. 21) The Court held that many of the Defendants' objections were not justified and that "the defendants have not responded in good faith at least contributing to the long delay." *Id*. The Court warned that if "the defendants choose to disobey these discovery orders or evade further discovery, harsh sanctions authorized by Rule 37(b)(2) shall be imposed."

(Dkt. 64, p. 22)

On February 8, 2017, Dannels moved the Court for another scheduling conference, representing:

> As the Court knows, this case has been delayed by discovery disputes from its inception in January 2014. On January 26, 2017, however, this Court issued an Order which, hopefully, will resolve the discovery disputes and allow the case to proceed. In the interim, however, some of the scheduling deadlines have passed and some will not be feasible until after BNSF responds to the initial discovery. For instance, February 22, 2017, two weeks from now, is the schedule for naming experts and lay witnesses, which will not be possible until further discovery is completed.

(Dkt. 65) On March 17, 2017, the Court reset the trial for March 5, 2018.

Defendants served supplemental discovery responses to Dannels' first written discovery on February 27, 2017. The discovery responses purported to produce discoverable information in response to the Court's January 26, 2017, order. However, in response to Interrogatory No. 5, BNSF responded:

> BNSF Claims Department currently runs thousands of reports each year. While some of these reports are run on a set schedule and retained in a central location, with set distribution lists, numerous Claims Department employees are able to run reports on their own and thousands of potentially responsive ad hoc reports are run each year. Providing the information requested would require an inquiry to all Claims Department employees with the ability to run reports in order to gather the requested information and take hundreds of hours of additional time.
>
> BNSF is working to identify whether it routinely runs any reports containing information about claims made by injured employees and the outcome of these claims. Discovery will be supplemented in accordance with the Rules of Civil Procedure.

Consistent with its response to Interrogatory No. 5, BNSF did not produce a single document in response to Request for Production No. 7. Instead, BNSF responded:

> BNSF incorporates its response to Interrogatory No. 5 as though fully set forth herein. It is not possible to disclose any reports identified in Interrogatory No. 5 without extensive

> redactions because the reports contain confidential settlement information, personal or confidential information of individuals not a party to this suit and other confidential and proprietary information. *Id.* BNSF's review of this information is ongoing and it will supplement this response with a privilege log if any documents are identified.

Since February 27, 2017, BNSF has never supplemented its responses to Interrogatory No. 5 or Request for Production No. 7.

On September 19, 2017, Dannels served BNSF with a Notice of Corporate Depositions, Request for Production, and Subpoena. (Dkt. 110) Dannels sought to depose a representative from BNSF on topics such as document retention/destruction, the organizational chart, claims handling, consultation with consulting firms, incentive plans, loss reserves, bad faith complaints against BNSF, claims settlement practices, and the handling of Dannels' underlying FELA claim. Dannels served a subpoena with the Notice of Corporate Deposition requesting that BNSF produce documents on enumerated topics. Dannels sought all documents relating to his underlying claim, including electronic data; copies of file jackets, telephone slips, and hand-written notes; all claims files, committee notes, memos, or documents relating to Dannels' underlying FELA claims; all case write-ups or summaries; payment records; methods of reserving or accruing losses; and SOX audit records. Dannels stipulated that BNSF could have until November 18, 2017, to produce the documents requested and subpoenaed under the Notice of Corporate Deposition.

Defendants responded to Dannels' notice of corporate deposition and additional discovery requests on

November 17, 2017. (Dkt. 125) Defendants objected to the discovery requests, claiming duplication, attorney client privilege, work-product privilege, and trade secret confidentiality. Notwithstanding its objections, Defendants referred Dannels to the documents previously produced and limited its production to three new documents—a record of authority, incident notes, and an audit checklist. Defendants produced no further documents from the claim file and failed to seek or obtain a protective order regarding the Rule 30(b)(6) topics or requests for production. BNSF objected to the discovery regarding loss reserves and failed to produce any responsive documents.

On November 29, 2017, BNSF moved to continue the trial date a fifth time. Dannels objected, arguing for his right to speedy trial and noting delays caused by BNSF's decisions which obstructed and delayed discovery for years.

Before going to Fort Worth, Texas, to take BNSF's Rule 30(b)(6) deposition, Dennis Conner wrote Jeff Hedger and Robert Phillips asking to meet and confer about discovery disputes, including production of the claims file and reporting of FELA results. BNSF brought its paper claims file to the deposition with a privilege log and stood on its privilege objections. At the end of the Rule 30(b)(6) deposition, Conner placed on the record that no motion for protective order was made concerning the deposition or production noticed and subpoenaed, and that BNSF's designee, Eric Hegi, on advice of counsel, refused to answer questions on all matters objected to in Defendants' Responses to the notice.

During November and December 2017 trips to Fort Worth, Dannels' counsel deposed Charles Shew-

make (BNSF's former general counsel and Vice President of Claims), Rick Lifto (BNSF's former Assistant Vice President of Claims), and Eric Hegi (BNSF's current Assistant Vice President of Claims and Rule 30(b)(6) designee). BNSF identified all three of these witnesses as expert witnesses in its Lay and Expert Witness Disclosure filed on November 20, 2017. (Dkt. 126) Defendants' expert witness disclosure advised that these witnesses will testify at trial that: Dannels' FELA claim was evaluated reasonably; BNSF made reasonable offers, given the facts of the claim; liability throughout the FELA claim was never reasonably clear; there was no malicious motive by the BNSF claims department; and the BNSF claims department used effective, good faith claims practices. To reach these conclusions, the witnesses relied on everything in the claims file, including information BNSF withheld from Dannels in discovery under the auspices of privilege.

In its January 26, 2017, Order, the Court reviewed Defendants' objections and held (1) the attorney-client privilege does not apply to information generated by an attorney acting as a claims adjuster, claims process supervisor, or claims investigation monitor; (2) ordinary and opinion work product protections are generally overcome in bad faith cases because (a) the claims file reflects a unique record of the claim's handling which cannot be obtained elsewhere and (b) the strategy, mental impressions, and opinions of the insurer's agents are directly at issue; (3) a defendant's claims practices are discoverable in a bad faith lawsuit; and (4) the attorney-client and work product privileges do not apply to documents generated with regard to claims practices. The Court noted that only opinion work product of BNSF's attorneys remains protected, absent the recognized exceptions.

The Court forecast that depositions of Defendants' personnel will be "ineffective without documents to cross-examine the witnesses and test both their innocent lack of recollection and natural biases." (Dkt. 64, p. 8) Despite the January 26, 2017, Order, Defendants refused to produce the ordinary work product of its outside counsel. However, Defendants' experts relied on this information in concluding Defendants acted in good faith. By most accounts, it appears BNSF withheld about 400 pages of the claims file from production.

Further, in support of his opinion that BNSF acted reasonably in the underlying FELA case, Hegi testified that BNSF wins 70% of cumulative trauma trials and only about 5% of FELA cases have reasonably clear liability sufficient to advance wage losses. When pressed about the figures, Hegi testified that BNSF tracks the results of FELA claims and reports the results monthly to superiors.

Shewmake likewise confirmed that he prepared monthly case summaries for his supervisors at BNSF. The summaries addressed issues and developments that Shewmake believed his supervisors needed to be aware of, including results obtained in FELA cases. BNSF never mentioned these reports in response to Interrogatory No. 5 or Request for Production No. 7. Despite the discovery requests seeking such reports, Dannels learned of these monthly case summaries for the first time at the Fort Worth depositions in November 2017.

After deposing Shewmake, Dannels served his Fifth Discovery Requests on Defendants on December 8, 2017. Dannels specifically asked Defendants to produce all FELA claims summaries produced by Shewmake to his superiors reporting the results obtained

in FELA cases, as described in his deposition. BNSF refused to produce any documents responsive to this request. Instead, BNSF asserted a host of objections like those lodged in May 2015.

On January 18, 2018, Dannels filed another motion to compel. (Dkt 184) Dannels sought an order from the Court compelling BNSF to produce (a) the entire claim file and all documents directly related to the handling, evaluation, and settlement of Dannels' underlying claim; (b) the monthly summaries referenced in the Shewmake and Hegi depositions; (c) the non-disparagement clauses of all former employees listed as witnesses and the contractual consequences of making a disparaging statement; and (d) all documents setting forth the procedures and methodologies BNSF uses in setting loss reserves in FELA cases. Dannels also moved for sanctions for Defendants' discovery abuses, including a default judgment on liability. While the motion to compel was limited to four subject matters, the motion for sanctions was premised on the aggregate discovery abuses perpetrated by BNSF throughout this case.

After filing the second motion to compel, Dannels deposed Dione Williams (BNSF's Director of Claims Services) on January 25, 2018. Williams testified that he produces an executive slide presentation once a year for the BNSF leadership. The information is also shared with the claims department. All the data pertains to the claims department and sets forth information on claim pay-outs, settled cases, and pending cases. The reports reflect data on FELA lawsuits, pay-out volume, average pay-outs, and cumulative trauma pay-out statistics. The reports trace where the FELA money goes. The deponents from Fort

Worth—Shewmake, Lifto, and Hegi—attend the conference where the information is presented. Williams depo., pp. 17-20. Yet, BNSF did not identify this information in response to written discovery requests. Dannels learned about the annual presentation for the first time at the Williams deposition.

Williams also testified that BNSF runs monthly reports on pending claims and lawsuits on a system-wide basis, across the country. BNSF, through the claims services department, can run reports on: cases in which BNSF has set high loss reserves, high dollar pay-out claims, litigated cases, cases with trial dates, the number of FELA claims filed against BNSF at any given time, pay-outs in FELA claims, the number of litigated FELA claims, the number of FELA cases BNSF has settled, the number and substance of FELA verdicts in recent years, and BNSF's win/loss record on FELA cases in recent years. BNSF can narrow these searches by geographical zone, state, or city. It can also narrow the injury searches to particular body parts and employment positions. BNSF can generate a report showing pay-outs to unrepresented claimants versus payouts to represented claimants. Williams depo., pp. 61-78.

BNSF did not identify any of these reports in response to Dannels' written discovery. Rather, BNSF provided a vague response to Interrogatory No. 5, identifying no specific data or report, and insisted that it would take hundreds of hours of additional time to identify and produce the information. Williams testified that his department regularly generates report information and could generate other specific detailed reports requested in about a week. Williams depo., pp. 69-70.

The Court heard oral argument on Dannels' second motion to compel on February 12, 2018, and entered an order on February 22, 2018. (Dkt. 216) The Court ordered BNSF to produce all claim file documents except those characterized as attorney-client communications and to submit to the Court for an *in-camera* inspection the purported attorney-client communications. As for the summaries referenced by Shewmake and Hegi, BNSF conceded it did not disclose the summaries even after the Court ordered them to meaningfully respond to Dannels' discovery. Dannels first learned of the summaries at Shewmake's deposition on November 30, 2017, and BNSF refused to produce them until after the Court granted Dannels' second motion to compel and directly ordered BNSF to do so. Regarding reserves, Dannels asked BNSF to identify someone to testify on its behalf. BNSF identified Hegi on the topic. Yet, Hegi had only limited information about loss reserves. Offering Hegi as its Rule 30(b)(6) designee on the topic of loss reserves did not meet BNSF's obligation. After again ordering BNSF to comply with its discovery obligations, the Court noted in the February 22, 2018, Order that, "[g]iven past difficulties with BNSF, this Court is seriously considering sanctions and the types of sanctions that may be appropriate in this case." (Dkt. 216 p. 27)

On March 15, 2018, BNSF filed and served its response in purported compliance with Paragraphs 5 and 6 of the Court's Order compelling discovery. Paragraph 5 required production of documents (subject to protective order) responsive to Dannels' requests for production regarding reserves and provided:

> This Order is not limited to documents already identified and claimed privileged. At a

> minimum, it includes documents disclosing how money set aside for the reserves is invested and earns investment income for BNSF from when an FELA claim has an expected loss that is both probable and reasonably estimable and a reserve is set until the claim is paid, who makes these investments, and the profits generated since Berkshire Hathaway purchased BNSF.

Id.

In response, BNSF produced Exhibit 698, part of its publicly available 2009 Form 10-K; Exhibit 699, the publicly available 2017 Form 10-K of the Travelers Company, Inc. (which is not involved with Berkshire Hathaway or any issue in this case); and Exhibit 700, the publicly available 2015 Form 10-K of the Allstate Corporation (which is not involved with Berkshire Hathaway or any issue in this case). The Defendants produced no documents disclosing how money set aside for the reserves is invested and earns investment income for BNSF from when an FELA claim has an expected loss that is both probable and reasonably estimable and a reserve is set until the claim is paid, who makes these investments, and the profits generated since Berkshire Hathaway purchased BNSF. BNSF individualizes what it does, but not what the Company or BNSF IC does in handling an earning profit from reserves on FELA claims. BNSF claims, for example, that it "does not maintain any reserve in an investment account, like an insurance company would." BNSF's individualized response fails to address its involvement in the handling and reserving of claims as documented in the Burlington Northern Santa Fe, LLC, Form-10 K for 2013 and the 2002 BNSF IC Business Plan. Paragraph 6 of the

Order required the Defendants to work with Dannels to identify a date and time for the deposition of Kristi Radford. BNSF responded that Felicia Williams, General Director Accounting, is the witness most knowledgeable at BNSF on these issues and that in lieu of Kristi Radford, Ms. Williams is the person that will testify at the hearing in Sidney, Montana, on April 18, 2018. While identifying Ms. Williams, the Defendants did not identify or produce any documents as responsive to the Court-ordered discovery or which Ms. Williams may use at the hearing, except Exhibits 698-700.

On March 19, 2018, BNSF filed its Supplemental Responses to Plaintiff's Rule 30(b)(6) Notice of Corporate Depositions, Requests for Production and Subpoena Pursuant to Court Order. (Dkt. 241) In response to the Order requiring production of documents relating to its reserves, it produced Exhibit 698, its 2009 Form 10-K. In further response to Request for Production No. 16, BNSF states it "has retained no outside company or consultant to study or review BNSF FELA claims handling practices or procedures and /or amounts paid out on FELA claims" (which is directly contrary to the Burlington Northern Santa Fe, LLC, Form-10 K for 2013, and the 2002 BNSF IC Business Plan). In further response to Request for Production No. 17, BNSF states it "has retained no outside company or consultant to study or review BNSF FELA claims handling practices or procedures and/or amounts paid out on FELA claims" (which is directly contrary to the Burlington Northern Santa Fe, LLC, Form-10 K for 2013, and the 2002 BNSF IC Business Plan). In further response to the Court's Order, BNSF identified publicly available Financial Accounting Standard 5 (" FAS 5"). Dannels had marked

this standard as Exhibit T to the Rule 30(b)(6) deposition of Hegi, who was completely unfamiliar with the standard.

Here, the Court has considered the interrelationship of Burlington Northern Santa Fe, LLC, and its subsidiaries, BNSF Railway Company (BNSF) and Burlington Northern Santa Fe Insurance Company, Ltd. (BNSF IC) as described in the Affidavit of Dennis Conner Detailing Deficiencies with Defendants' Compelled Discovery. (Dkt. 245) Given their relationships, BNSF must have within its possession, custody or control the documents discussed and further ordered to be produced within this Order.

On February 12, 2010, Berkshire Hathaway Inc., a Delaware corporation (Berkshire), acquired 100% of the outstanding shares of Burlington Northern Santa Fe Corporation common stock that it did not already own. Burlington Northern Santa Fe, LLC, is a holding company that conducts no operating activities and owns no significant assets other than through its interests in its subsidiaries, including BNSF Railway Company (BNSF) and Burlington Northern Santa Fe Insurance Company, Ltd. (BNSF IC).

The financial statements of Burlington Northern Santa Fe, LLC, and its subsidiaries, including BNSF and BNSF IC, are consolidated. Burlington Northern Santa Fe Corporation's principal, wholly-owned subsidiary is BNSF, which operates one of the largest railroad networks in North America with approximately 32,500 route miles (excluding multiple main tracks, yard tracks and sidings) in 28 states and two Canadian provinces.

The Company has a consolidated wholly-owned subsidiary, BNSF IC, which provides insurance coverage for certain risks, including Federal Employers' Liability Act (FELA) claims.

The Company records an undiscounted liability for personal injury and FELA claims when the expected loss is both probable and reasonably estimable. The liability and ultimate expense projections are estimated using standard actuarial methodologies. Liabilities recorded for unasserted personal injury claims are based on information currently available. Expense accruals and any required adjustments are classified as materials and other in the Consolidated Statements of Income. Liabilities for personal injury and FELA claims are initially recorded when the expected loss is both probable and reasonably estimable. Estimates of liabilities for these claims are undiscounted.

The Company estimates its liability claims and expenses quarterly based on the covered population, activity levels and trends in frequency and the costs of covered injuries. Estimates include unasserted claims except for certain repetitive stress and other occupational trauma claims that allegedly result from prolonged repeated events or exposure. Key elements of the actuarial assessment include:

- Size and demographics (employee age and craft) of the workforce.
- Activity levels (manhours by employee craft and carloadings).
- Expected claim frequency rates by type of claim (employee FELA or third-party liability) based on historical claim frequency trends.

- Expected dismissal rates by type of claim based on historical dismissal rates.
- Expected average paid amounts by type of claim for open and incurred but not reported claims that eventually close with payment.

From these assumptions, BNSF estimates the number of open claims by accident year that will likely require payment by the Company. The projected number of open claims by accident year that will require payment is multiplied by the expected average cost per claim by accident year and type to determine BNSF's estimated liability for all asserted claims. Additionally, the Company estimates the number of its incurred but not reported claims that will likely result in payment based upon historical emergence patterns by type of claim. The estimated number of projected claims by accident year requiring payment is multiplied by the expected average cost per claim by accident year and type to determine BNSF's estimated liability for incurred but not reported claims. BNSF monitors quarterly actual experience against the number of forecasted claims to be received, the forecasted number of claims closing with payment and expected claim payments. Adjustments to the Company's estimates are recorded quarterly as necessary or more frequently as new events or revised estimates develop. At December 31, 2013, and 2012, $85 million and $105 million were included in current liabilities, respectively. In addition, defense and processing costs, which are recorded on an as-reported basis, were not included in the recorded liability. The Company is primarily self-insured for personal injury claims. Because of the uncertainty surrounding the ultimate outcome of personal injury claims, it is rea-

sonably possible that future costs to settle personal injury claims may range from approximately $340 million to $455 million. However, the Company believed that the $387 million recorded at December 31, 2013, was the best estimate of its future obligation for the settlement of personal injury claims. The amounts recorded by BNSF for personal injury liabilities were based upon currently known facts. Future events, such as the number of new claims to be filed each year, the average cost of disposing of claims, as well as the numerous uncertainties surrounding personal injury litigation in the United States, could cause the actual costs to be higher or lower than projected.

BNSF IC provides insurance coverage for FELA and other claims which are subject to reinsurance. BNSF IC has entered into annual reinsurance treaty agreements with several other companies. The treaty agreements include insuring against general liability and FELA risks. In accordance with the agreements, BNSF IC cedes a portion of its FELA exposure through the treaty and assumes a proportionate share of the entire risk. At December 31, 2013, there was approximately $480 million related to these third-party investments, which were classified as cash and cash equivalents on the Company's Consolidated Balance Sheet, as compared with approximately $485 million at December 31, 2012.

At BNSF's request, the Court held an evidentiary hearing on Dannels' Motion for Sanctions on April 18, 2018. BNSF solicited testimony from three witnesses in opposition to Dannels' motion. BNSF called Felicia Williams (BNSF General Director of Accounting), Christopher Decker (attorney with Boone Karlberg and former defense counsel in this case for BNSF), and James Roberts (BNSF Senior General Attorney).

BNSF called Williams to address the issue of loss reserves. Apparently, the point of Williams' testimony was to explain BNSF's treatment of reserves—purportedly to correct the Court's prior findings on the matter.

Lost on BNSF, however, is the critical notion it underscored in offering Williams' testimony. Williams essentially testified that she is the person best suited to testify about accounting principles, financial standards, and machinations associated with reserves on behalf of BNSF. She offered the kind of information which is calculated to lead to the discovery of admissible evidence. Dannels sought this kind of information in discovery and did not receive it. Rather than designating Williams as its corporate representative on the topic of reserves, BNSF designated Hegi to testify. Hegi admittedly had little information on the subject matter which thwarted the discovery Dannels sought.

At this juncture, the purpose of the hearing was not to confirm judicially whether BNSF complies with accounting standards or the like. The purpose of the hearing was to determine whether the Court should impose sanctions on BNSF for its discovery abuses. On this front, Williams' testimony was inapposite. In terms of production of documents in discovery, Williams' only involvement was with BNSF's financial statement. As the Court noted at the hearing, Williams was not the right person to defend BNSF's discovery positions.

Williams is primarily a financial, and not a management, accountant. She had no idea about results obtained in FELA cases or what management does to monitor FELA results or profits earned on accounts where funds are held on set-aside reserves. She

acknowledged BNSF is one of the largest railroad networks in North America and its Form 10-K reports work-related injuries are a significant expense for the railroad. She knew of no changes in the business model of the Burlington Northern companies over her career that extends before 2002.

She was asked about the Company's April 22, 2002, Business Plan, under which BNSF Insurance Company was to act as the consolidation point for collection of all relevant claims data with results, risk analysis, costs and reserve management to be handled by the actuary Tillinghast-Towers Perrin. She was unfamiliar with the management plan under which the company manages and handles its FELA claims. She acknowledged that according to Form 10-K reporting, the company now doing the actuarial work for the company is Willis Towers Watson. Tillinghast was the world's largest actuarial practice focused on insurance and a unit of Towers Perrin specializing in risk management and actuarial consulting. The Tillinghast business of Towers Perrin provided consulting and software solutions to insurance and financial services companies and advised other organizations on risk financing and self-insurance. In January 2010, Towers Perrin merged with Watson Wyatt Worldwide to form Towers Watson where Tillinghast became part of the risk management group. Williams knew nothing about the claims handling except aggregate numbers she gets from the claims department.

Williams did not even know whether BNSF earns any interest income on its large liquid assets or reserves. She did not know whether anyone consults with the company on amounts earned or paid out on FELA funds.

Next, BNSF called Decker. BNSF limited its questions of Decker to the work he did in discovery in the present matter. Decker was involved in the initial discovery on behalf of BNSF. Decker worked with BNSF on discovery from approximately April/May 2015 to August/September 2017. Decker described the effort he and his firm undertook to identify documents responsive to Dannels' discovery requests. Decker testified that he and his firm undertook a good-faith effort to obtain responsive documents and withhold privileged documents. The Court acknowledges this testimony and casts no dispersions on Decker or his law firm about BNSF's discovery abuses.

BNSF offered Decker's testimony to suggest its discovery positions were substantially justified throughout the discovery process. This notion may hold water at the action's inception. However, BNSF cannot reasonably argue substantial justification for spurning court orders. The Court will not permit BNSF to hide behind the cloak of its uninformed local Montana defense counsel. The discovery requests submitted to BNSF primarily involved information beyond Decker's personal knowledge:

> Q: Alright. Now, you don't know personally the answers to the questions that are being asked of you, do you? Not the questions being asked you, but the questions being asked the railroad as in discovery. As a general rule, that's information beyond your knowledge, right?
>
> A: That's often the case, yes.

> Q: Okay. And in this case, there was a lot of information that was being asked that you had no idea about, right?
>
> A: There-yeah, when requests are asked, usually I don't have a good working knowledge of what's out there.

Decker testimony, p. 85. Because Decker did not know what information BNSF had, he worked with BNSF employees to identify information responsive to discovery requests and obtain BNSF's input.

On this front, it appears BNSF fell short in identifying responsive documents for Decker's consideration. For instance, BNSF did not advise Decker of the monthly summaries Dione Williams described. BNSF did not call Decker's attention to the monthly summaries Shewmake and Hegi described. BNSF did not produce any actuarial studies or reserve information unrelated to Dannels for Decker's consideration. BNSF did not produce any information on the outcome of FELA cases and any potential profits it may earn in holding money associated with claims. Rather, BNSF simply advised Decker that it had nothing specific in response to the request for reports and it would take hundreds and hundreds of hours to comply with the request.

Decker's contact at BNSF in putting together compelled discovery responses Dannels' discovery requests, which included Interrogatory No. 5, was primarily Jill Rugema, an in-house BNSF attorney. Also assisting Decker with BNSF's compelled discovery responses in-house BNSF attorney, Tom Jayne. The BNSF Law Department Guide requires case closing trial results be reported. Rugema and Jayne were recipients of the monthly summaries of results obtained

in FELA cases Shewmake generated and reported to his superiors. They also would have authored or received monthly status reports of cases they were overseeing or involved in. Yet, they identified none of these reports. After his last motion for sanctions, Dannels learned through the deposition of Dione Williams that an executive slide presentation is made each year that presents information to BNSF leadership about all the FELA claims that had been filed, whether they were settled, the amount paid and all of that. BNSF did not tell or inform Decker about this reporting of results and he was unaware of its existence. No one at BNSF told Decker or made him aware that claims representatives were required to update all information on their FELA claims and monthly reports are run showing the outcome of those cases. When Decker was involved in the case, he never produced any actuarial studies or reserve information. He did not produce any information on the outcome of FELA cases and profits that might be earned on reserves not paid out. He did not have that information. In assisting Decker in answering discovery, Rugema and Jayne did not disclosure relevant discoverable information and documents. Instead of having knowledgeable people within BNSF sign its answers to interrogatories, BNSF had Decker verify the answers under oath.

BNSF called Roberts as its final witness. BNSF questioned Roberts on the four subjects implicated by Dannels' second motion to compel. Roberts testified about whether BNSF was substantially justified in characterizing the monthly summaries Shewmake referenced as privileged. BNSF did not take a writ challenging the production and made no reasonable effort to comply with compelled discovery. Roberts attended Hegi's deposition and knew Hegi continued to

make reports to his superiors of results obtained. These reports would include, for example, the results obtained in Iron Horse, which involved a FELA claim and trial almost contemporaneous with Dannels'. There was not even an inquiry made to obtain Hegi's reports despite the Court's order compelling their production. Roberts testified that setting reserves is a function of the claims department and more of an art than a science. Roberts testified that BNSF has sparse documentation outlining how to set a reserve in an FELA case. He described his view on the distinction between loss reserves and the notion of reasonably clear liability. On the reserve front, Roberts' testimony was narrow—it primarily addressed the claims department's function of setting loss reserves in an adversarial claim. However, Dannels' discovery requests were not so limited, and Roberts did not address BNSF's discovery deficiencies on the expanded reserve information Dannels requested. Roberts had no information about tax implications or accounting principles associated with reserves. Once the claims department sets its loss reserve on a case, Roberts did not know what happens in the aggregate with BNSF reserves.

DISCUSSION

"The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation." *Richardson v. State,* 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634 (citations omitted). The modern rules of discovery and pre-trial procedure "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts

disclosed to the fullest practicable extent." *Richardson,* ¶ 22 (citations omitted).

Richardson serves as the guidepost regarding discovery abuse and concomitant sanctions. In *Richardson,* Clarice Richardson fell on the smooth troweled concrete floor of the women's locker room at the Montana College of Technology. Richardson ultimately filed suit against the State of Montana regarding the dangerous condition in the locker room. Richardson served written discovery seeking information on other slip and fall incidents at the facility, warnings about the conditions; protective measures undertaken by the State, and maintenance of the subject structures. The State refused to answer the discovery and asserted meritless objections—relevance, not reasonably calculated to lead to the discovery of admissible evidence, vague, ambiguous, etc. Thereafter, Richardson moved to compel meaningful responses. In the meantime, the State moved for summary judgment.

The trial court agreed with Richardson that she sought discoverable information. Accordingly, it granted the motion to compel and ordered the State to provide meaningful responses. The State subsequently responded to the discovery requests but failed to answer requests about other falls at the facility. In other words, the State provided incomplete responses to discovery in derogation of the trial court's discovery order. Richardson's counsel again contacted counsel for the State seeking answers. Then, over seven months after Richardson's initial discovery requests, over two months after discovery had closed, and a mere eleven days before trial, the State finally provided information about other falls. Richardson was put in the untenable position of going to trial with short notice and little discovery on the newly produced

information or acquiescing to additional delay and expense. Richardson went to trial, obtained an adverse verdict, and subsequently moved to amend the judgment by entering default judgment on liability against the State as a sanction for the discovery abuses. The trial court denied Richardson's post-trial motion and Richardson appealed.

The Montana Supreme Court reiterated the foregoing maxims of discovery. It noted the State's discovery postures improperly concealed evidence and hid behind baseless objections. The actions directly contravened the express purpose of discovery and severely undermined the integrity of the litigation. *Richardson,* ¶ 23. The Montana Supreme Court held:

> This Court strictly adheres to the policy that dilatory discovery actions shall not be dealt with leniently. As we have said, the trial courts, and this Court on review, must remain intent upon punishing transgressors rather than patiently encouraging their cooperation. Accordingly, the imposition of sanctions for failure to comply with discovery procedures is regarded with favor. "It is, after all, a maxim of our rules of discovery that the price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires."
>
> We have adopted this policy of intolerance regarding discovery abuse pursuant to our "concern over crowded dockets and the need to maintain fair and efficient judicial administration of pending cases."

Richardson, ¶¶ 56-57 (citations omitted).

The Montana Supreme Court noted its prior admonitions that some discovery abuses warrant the imposition of default judgment on liability. *Richardson,* ¶ 58, citing *Schuff v. A.T. Klemens & Son,* 2000 MT 357, 303 Mont. 274, 16 P.3d 1002, and *Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens &* Co. *Inc.,* 2005 MT 254, 329 Mont. 38, 122 P.3d 431. These discovery abuses, which justified the ultimate sanction of default, prohibited meaningful follow-up discovery, prevented the plaintiffs from assessing the merits of defenses and building cases-in-chief, and forcing the plaintiffs to incur mounting litigation costs while proceeding under a cloud of uncertainty. *Richardson,* ¶¶ 58-59. Because of the State's improper discovery positions, Richardson "was indeed faced with a no-win situation—i.e., either proceed to trial without fully investigating and developing the evidence of other falls or incur the needless expense and hassle of continuing the trial and conducting further preparation which could have been achieved earlier with timely disclosure from the State." *Richardson,* ¶ 61.

The Montana Supreme Court held that the State's discovery abuse directly undermined the objectives of Montana's Rules of Civil Procedure—to secure the just, speedy, and inexpensive determination of every action:

> Achieving a just determination is contingent upon full disclosure. As we have stated, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Achieving a speedy and inexpensive determination is contingent upon timely disclosure, which is thwarted by protracted legal wrangling over semantic nuances and technicalities.

Richardson, ¶ 63. Ultimately, the Montana Supreme Court held:

> Because the State's discovery abuse here was so blatant and systematic, and because it undermined the integrity of the entire proceeding, the only proper sanction is a default judgment on the issue of liability, just as we approved in *Schuff* and *Culbertson.* Any less severe sanction would be inconsistent with the rule that punishment for discovery abuses must be made unbearable in order to thwart the inevitable temptation which zealous advocacy inspires.

Richardson, ¶ 65. The Montana Supreme Court recently affirmed these same notions in *Cox v. Magers,* 2018 MT 21, 390 Mont. 224, 411 P.3d 1271.

As Rule 37, Mont. R. Civ. P., recognizes, trial courts are "in the best position to know . . . which parties callously disregard the rights of their opponents and other litigants seeking their day in court[] [and are] also in the best position to determine which sanction is the most appropriate." *Smith v. Butte-Silver Bow County,* 276 Mont. 329, 332, 916 P.2d 91, 93 (1996). As such, the Montana Supreme Court generally defers to the decision of the trial court regarding Rule 37, Mont. R. Civ. P., sanctions. *Smith,* 276 Mont. at 332, 916 P.2d at 93.

As confirmed by *Richardson,* litigants in Montana have long had notice of the judiciary's expectations of parties in discovery. Litigants have likewise long had notice of the consequences for discovery abuse. This is especially true of BNSF.

In *Spotted Horse v. BNSF R.R.* Co., 2015 MT 148, 379 Mont. 314, 350 P.3d 52, the Montana Supreme

Court recounted a disturbing history of discovery abuses perpetrated by BNSF. It referred to BNSF as a "seasoned and sophisticated corporate litigant." *Spotted Horse, ¶* 27. Yet, despite its litigation recurrence, BNSF is not entitled to unilaterally control discovery and the exchange of evidence. *Spotted Horse,* ¶ 30. That is precisely what BNSF has attempted here. To that end, Justice Wheat specially concurred in *Spotted Horse,* concluding:

> It is the obligation of every Montana court to protect the integrity of the judicial system and to ensure proper administration of justice. See *Oliver v. Stimson Lumber* Co., 1999 MT 328, ¶ 31, 297 Mont. 336, 993 P.2d 11. Usually this means that there is a presumption in favor of resolution of controversies on their merits. But, in cases where a party maliciously misuses our judicial system, this presumption is forfeited and the obligation to protect the judicial system instead requires courts to remedy the misuse, to punish the misuser, and to deter future misuse. See *Richardson v. State,* 2006 MT 43, ¶ 68, 331 Mont. 231, 130 P.3d 634; *Schuff v. A.T. Kiemens & Son,* 2000 MT 357, ¶ 81, 303 Mont. 274, 16 P.3d 1002; *Oliver,* ¶ 34.

Spotted Horse, ¶ 47.

The Montana Supreme Court has noted other inappropriate BNSF conduct perpetrated to undermine the truth-finding function. In *Anderson v. BNSF Ry.,* 2015 MT 240, ¶ 79, 380 Mont. 319, 354 P.3d 1248, the Court held that BNSF undermined the truth-finding function of the jury through repeated use of inflammatory and wholly inappropriate remarks. Justice Wheat again specially concurred, noting:

We recently noted in *Spotted Horse v. BNSF* that the defendant here appears to have a pattern of practice that relies on misconduct to prevail in court. See *Spotted Horse v. BNSF,* 2015 MT 148, ¶¶ 22-27, 379 Mont. 314, 350 P.3d 52 (listing district court cases documenting discovery abuses and spoliation of evidence by BNSF). I note that Hedger Friend, PLLC, the law firm representing the BNSF here is the same firm (albeit a later iteration of the firm) that represented BNSF in the district court cases we cited to show a pattern and practice of misconduct. I also note that in one of those cases, the district court commented that it "repeatedly warned BNSF, through its common counsel, about its common pattern and practice of discovery in other FELA cases currently or recently pending." Order Imposing Sanctions, Danielson v. BNSF, CDV-04-124(d) at 15 (Mont. Eighth Jud. Dist. Ct March 13, 2006). Despite those warnings, BNSF's counsel continued to engage in conduct the district court characterized as "part of a larger recurring pattern and practice of dilatory and obstructive discovery practices." *Danielson* at 25. The district court sanctioned BNSF for its misconduct by barring BNSF from presenting any evidence or argument contesting the plaintiffs proof of negligence in one case and granting default judgment as to liability in the other. *Danielson* at 25.

I also note that every time BNSF is called to account for its misconduct, it takes the same approach it took here, which is to treat

each incidence of misconduct as though it occurred in isolation from all the others. A district court in Minnesota noted that tactic in an order granting over $4 million in sanctions against BNSF for multiple, flagrant instances of misconduct:

> This Court is satisfied that the record, which has developed over a period of six years, overwhelmingly supports a finding that BNSF did, in fact, engage in conduct and decision making that compromised critical evidence, interfered with witnesses, impeded the investigation by law enforcement, and misled and/or misrepresented a number of facts to Plaintiffs and this Court. BNSF has attempted to explain away this misconduct in piecemeal fashion by attributing much to inadvertence, coincidence, honest mistake, and/or legitimate business practices. This Court is simply not persuaded. Taken alone, some of BNSF's abuses might not be sanctionable, and indeed might have been understandable given the complexities of this case. But the breadth of BNSF's misconduct in this case is staggering.

Order, Chase v. BNSF, No. C4-05-1607 (Minn. Tenth Jud. Dist. Ct, Oct. 15, 2009). The majority opinion here notes the same problem with BNSF's tactic of treating each incidence of improper argument in isolation. Opinion, ¶ 78. I submit that just as we refuse to view each improper comment in isolation from the others, so should we refuse to view this case in

> isolation from all the other documented cases in which this party has sought to prevail through misconduct. Although the misconduct documented in *Spotted Horse, Danielson,* and *Chase* primarily involved discovery abuses, misrepresentations, and evidence tampering, it is nonetheless relevant to the misconduct here because it shows a pattern of trying to win trials by misconduct, rather than merit.
>
> As I noted in *Spotted Horse,* it is the obligation of every Montana court to protect the integrity of the judicial system and to ensure proper administration of justice. *Spotted Horse, ¶* 47 (Wheat, J., concurring) (citing *Oliver v. Stimson Lumber* Co., 1999 MT 328, ¶ 31, 297 Mont. 336, 993 P.2d 11). Where a party shows a repeated intent to flout the judicial system's strong preference that cases be decided on their merits—and instead tries to win the case on the basis of how much misconduct it can get away with—that party forfeits the right to have its case decided on the merits, and default judgment on liability becomes the appropriate remedy.

Anderson, ¶¶ 85-87.

In recent years, several trial courts in Montana have imposed sanctions on BNSF, including default judgment, for discovery abuses. See, e.g., *Sherrill v. BNSF Railway* Co., Montana Eighth Judicial District Court, Cascade County, Cause No. BDV-13-834 (Judge Wheelis); *Trombley v. BNSF Railway* Co., Montana Eighth Judicial District Court, Cascade County, Cause No. DDV-13-331 (Judge Sandefur); *An-*

derson v. BNSF Railway Co., Montana Eighth Judicial District Court, Cascade County, Cause No. CDV-08-1681 (Judge Kutzman); and *DeLeon v. BNSF Railway* Co., Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DV-13-0729 (Judge Fagg). BNSF's abusive litigation tactics apparently extend far beyond Montana's borders. Many courts have confronted similar discovery abuses perpetrated by BNSF over the years and sanctioned it accordingly. See the Affidavit of James R. Conner with Attached Orders (Dkt. 246).

The historical abuse chronicled above and in the corresponding sanctions orders from around the country is certainly troubling. Nevertheless, to be clear, BNSF's misconduct from other cases did not factor into the Court's determination of sanctions in the case at bar. The Court simply references the foregoing case law as a guidepost on sanctions considerations. BNSF's discovery abuses in this case stand on their own dubious merit and form the sole basis for the Court's sanctions determination.

> The Court set forth the factual background in painstaking detail above. It will not reiterate all of that again. Suffice it to say that this case has vanquished in the discovery phase for years, in large part due to BNSF's recalcitrance.

Dannels filed this bad faith case in January 2014. He served his first set of discovery requests on Defendants in August 2014. Like many of the foregoing cases, the discovery sought information calculated to lead to the discovery of admissible evidence. When a discovery request (or order compelling discovery) can reasonably be interpreted, in the context of seeking discoverable information relating to claims and defenses at issue, the recipient must interpret it that

way, rather than imputing some meaning to the request which would render it vague, ambiguous, or objectionable in some other respect. If litigants were allowed to do otherwise, the discovery process would not serve its purpose. Discovery rules are written in general terms, imposing a broad duty of disclosure. *Richardson,* ¶ 52. The Montana Rules of Civil Procedure require a good faith effort in serving discovery responses. See Rules 11 and 26(g), Mont. R. Civ. P.

As in *Richardson,* BNSF rejected the foregoing principles and essentially served non-responses. Defendants finally responded to the discovery requests in May 2015. They objected to nearly every discovery request and failed to provide meaningful information. Approximately two weeks later, on the heels of the improper discovery responses, Defendants moved for summary judgment on Dannels' claims. Given the positions Defendants advanced in response to the discovery requests, Dannels was forced to file a motion to compel.

This Court carefully reviewed the requests and responses and granted Dannels' motion to compel. The Court specifically instructed Defendants how to respond to the discovery meaningfully. It further cautioned that it would enter sanctions for future discovery abuses. Nevertheless, BNSF continued to violate the spirit and intent of Montana's rules of discovery. BNSF has consistently attempted to conceal information and evade its discovery obligations. To be clear, this is not a reflection on Defendants' attorneys. The Court imagines, as Decker alluded to, that defense counsel's hands are somewhat tied regarding the existence and possession of internal BNSF documents. On that front, defense counsel necessarily relies on the representations of their corporate client.

Yet, with BNSF, there seems to be a corporate pattern, practice, and mindset of superiority, invincibility, or both.

The pattern this case follows is similar to past BNSF cases and other cases in which courts have imposed default judgment as a sanction for discovery abuse. That is, the pattern which has emerged in this case is a legitimate discovery request, followed by evasive non-responses, a motion to compel, an order to compel, qualified and incomplete responses from BNSF following the order to compel, deposition testimony and/or evidence contradicting BNSF's written discovery responses, more discovery meetings, a second motion to compel, more incomplete responses from BNSF, and, ultimately, hollow explanations for the noncompliance which purport to cast blame in all directions but Fort Worth.

Now, almost five years after the case was filed, following repeated scheduling orders and extensions, following the fourth trial date being vacated, despite repeated admonitions, Dannels still does not have everything he requested from BNSF and was entitled to receive and was court-ordered to receive. Simply put, BNSF is not entitled to the self-serving, unilateral discovery positions it has taken throughout discovery. Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents.

Defendants' discovery tactics have prevented Dannels from fully assessing the merits of the proffered defenses and building his case-in-chief, while simultaneously forcing him to incur mounting litigation costs. These discovery abuses put Dannels in the predicament of further continuances and delay or try-

ing the case without evidence he is entitled to. Defendants' discovery abuses have consumed valuable hours and judicial resources. And, Dannels now faces a fifth trial setting, more than four years removed from when he filed this case

In a December 5, 2010, article in the Minneapolis Star Tribune, Shewmake analogized BNSF's litigation tactics to sports games. Shewmake said litigation is an adversarial process where both sides try hard to win. Occasionally, Shewmake said attorneys on both sides break the rules. He compared BNSF's litigation conduct to World Cup soccer and stated: "Some of the best athletes in world competing at a high level and sometimes they get yellow-carded 'cause they're competing so hard...Were they trying to be malicious? Were they trying to hurt somebody? I don't think so. When you get in this adversarial mode, I think both sides on occasion will get yellow-carded." The article goes on to report where BNSF has been frequently "yellow-carded" for litigation misconduct, including punishment for misconduct in seven Montana cases between 2003 and 2010, and a $4.2 million sanction in Minnesota.

Shewmake's analogy of litigation to a sports game is troubling because litigation is not a game. Litigation, unlike a sports game, involves serious issues that significantly affect the lives of real people. The view that litigation is a game in which a player may be "yellow-carded" reveals an intention to break rules to win. Montana courts have an obligation to discourage the strategy of trying to win trials by misconduct, rather than merit. As a sophisticated litigant, BNSF is free to forge a path of its desire if left unchecked. This Court's previous orders were not enough of a yellow

card to steer the Defendants toward following discovery rules or court orders. Hopefully, the resulting sanctions will have a greater deterrent effect and will discourage future abuse of the discovery process to conceal relevant evidence or impede the orderly adjudication of a case.

CONCLUSION

This Court warned BNSF about its discovery obligations and the potential for sanctions for noncompliance. Nevertheless, BNSF committed discovery abuses throughout the life of this case. Dannels suffered prejudice as a direct result of BNSF's pervasive discovery abuses.

Rule 37, Mont. R. Civ. P., vests this Court with wide discretion to impose sanctions for the discovery abuses. As chronicled above, BNSF has continuously provided evasive or incomplete responses to legitimate discovery requests and failed to comply with this Court's discovery orders. BNSF's conduct has not been substantially justified, particularly after this Court entered the initial discovery order on Dannels' motion to compel. Rule 37 contemplates a number of potential sanctions, including, but not limited to, default judgment or any other appropriate sanctions. Further, Rule 37 provides "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."

BNSF's discovery tactics in this case are abhorrent. Notably, BNSF engaged in this discovery conduct on the heels of default judgments entered against it in *Sherrill* and *Trombley* (cases venued in the same

judicial district) for discovery abuses. Clearly, the default judgments alone did not phase BNSF and its internal discovery team. Again, the Court notes BNSF's historical pattern for context, but the conduct at issue in this case is what forms the basis for the sanctions imposed.

Based on the foregoing, the arguments and submissions in this case, and everything of record in this matter:

1. Dannels' motion for sanctions against BNSF is **GRANTED**;
2. The Court hereby enters a default judgment on liability and causation against BNSF;
3. This case shall proceed to trial solely on the measure of damages Dannels is entitled to recover on his bad faith claims, and whether he should recover punitive damages against Defendants and, if so, the amount;
4. The Court hereby reserves entering a monetary sanction against BNSF for its discovery abuses until after the conclusion of the trial;
5. BNSF shall pay Dannels' reasonable expenses, including attorney fees, caused by BNSF's discovery abuses. Dannels' attorneys shall submit an itemization of such expenses, with supporting documentation if necessary, for the Court's consideration by December 17, 2018. BNSF may respond to the itemization of expenses by December 31, 2018. The Court may hold a reasonableness hearing on the expenses if necessary;
6. In addition to discovery otherwise compelled, as an additional sanction, it is

FURTHER ORDERED that by December 17, 2018, BNSF shall produce:

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

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

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

Dated this 16th day of November, 2018.

s/ Katherine M. Bidegaray
Katherine M. Bidegaray
District Court Judge

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 18-0054

NANCY AHERN, BNSF INSURANCE COMPANY, LTD., BNSF RAILWAY COMPANY,

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY, KATHERINE M. BIDEGARAY,

Respondent.

ORDER

[Filed: February 20, 2018]

Petitioners BNSF Railway Company and Nancy Ahern (collectively "BNSF"), through counsel, filed a Petition for Writ of Supervisory Control with this Court on January 25, 2018, requesting this Court to review the Eighth Judicial District Court's Order Denying Defendant's Motion to Disqualify Plaintiff's Current Counsel in Cause No. BDV-14-001, *Dannels v. BNSF Railway Company, et al.* BNSF also requested this Court stay the District Court's proceedings pending disposition of this Petition. After review

of the Petition, this Court deemed it appropriate to order a response. The Honorable Katherine M. Bidegaray, and Robert Dannels, Plaintiff in the underlying proceeding, have both filed responses.

After obtaining a judgment against BNSF in an FELA action, Dannels commenced a bad faith action against BNSF on January 2, 2014. Dannels' counsel in the FELA action—Erik Thueson, Dennis Conner, and Keith Marr—represent him in the bad faith action, and have done so since its inception. On June 30, 2017, approximately three-and-a-half years into the case, BNSF moved to disqualify all of Dannels' attorneys pursuant to Rule 3.7 of the Montana Rules of Professional Conduct. The District Court denied BNSF's motion. BNSF seeks a writ of supervisory control, contending that the District Court erred by holding that Plaintiffs counsel are not necessary witnesses, and that allowing them to act as advocates at trial forecloses BNSF's ability to present certain evidence in their defense, prejudices the entire trial, and violates Montana Rule of Professional Conduct 3.7. BNSF also argues that Dannels' bad faith claim is preempted by the FELA.

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

The denial of a motion to disqualify counsel is within a district court's discretionary powers, which we review for an abuse of discretion. *Schuff v. A.T. Klemens & Son,* 2000 MT 357, ¶ 26, 303 Mont. 274, 16

P.3d 1002. In its Order denying BNSF's motion to disqualify Dannels' counsel, the District Court first walked through the procedural history of the case, before analyzing BNSF's general allegations, and then analyzing BNSF's allegations as they pertained specifically to each of Dannels' individual counsel. The District Court ultimately concluded:

> For approximately three years, this bad faith case was litigated—on both sides—by the same attorneys who litigated the underlying case. If [BNSF] truly believed any of Dannels' counsel to be "necessary witnesses" in this matter, it could, and should, have been raised years ago. [BNSF] effectively waived this issue by waiting to raise it until 2017. Regardless, even under a strictly fact-based analysis, [BNSF has] not met [its] burden to disqualify Dannels' attorneys under Rule 3.7 of Montana's Rules of Professional Conduct.

We are not convinced that BNSF has satisfied the requirements for this Court to exercise the extraordinary remedy of supervisory control. First, relative to BNSF's motion to disqualify Dannels' counsel, as the District Court appropriately noted, this issue "could, and should, have been raised years ago." BNSF does not explain in its Petition why it did not move to disqualify Dannels' counsel earlier in the case. To the extent that there may be urgency or emergency factors making the normal appeal process inadequate, the urgency is of BNSF's own making.

Second, this case does not involve a purely legal question. BNSF cites Judge Molloy's analysis of Rule 3.7 in *Nelson v. Hartford Ins. Co. of the Midwest,* 2012 U.S. Dist. LEXIS 30983 (D. Mont. Mar. 8, 2012), as

being "directly on point and persuasive." As the District Court pointed out in its Order, however, Judge Molloy noted in *Nelson* that "a categorical exclusion from bad faith actions of the attorney who represented the plaintiff in the underlying action is too broad." *Nelson,* 2012 U.S. Dist. LEXIS 30983, at *11. While noting that "Judge Molloy found the attorney to constitute a necessary witness under Rule 3.7 based on the unique facts of that case," and finding his analytical framework under Rule 3.7 relevant and applicable, the District Court nevertheless "reache[d] a different conclusion based on the distinct facts of this case." Ultimately, the District Court concluded "even under a *strictly fact-based analysis,* [BNSF has] not met [its] burden to disqualify Dannels' attorneys under Rule 3.7 of Montana's Rules of Professional Conduct." (Emphasis added.)

BNSF also argues that we should exercise supervisory control because, it contends, Dannels' bad faith claim is preempted by the FELA. BNSF does not address or, for that matter, even cite this Court's opinion in *Reidelbach v. Burlington N. & Santa Fe Ry. Co.,* 2002 MT 289, 312 Mont. 498, 60 P.3d 418, in which we rejected this very argument. As Dannels aptly notes in his response to BNSF's petition, "By definition, it is not a 'mistake of law' for a District Court to abide by binding precedence [sic]." More to the point, if BNSF wants this Court to revisit our opinion in *Reidelbach,* the normal appeal process is certainly adequate for that purpose.

Therefore,

IT IS ORDERED that the petition for a writ of supervisory control is DENIED and DISMISSED.

The Clerk is directed to provide Copies of this Order to counsel for Petitioners BNSF and Nancy Ahern, counsel for Robert Dannels, and the Honorable Katherine M. Bidegaray, presiding District Court Judge.

DATED this 20th day of February, 2018.

s/ Mike McGrath
Chief Justice

s/ James Jeremiah Shea

s/ Beth Baker

s/ Ingrid Gustafson

s/ Dirk M. Sandefur
Justices

APPENDIX D

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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

ROBERT DANNELS, Plaintiff, v. BNSF RAILWAY COMPANY, BNSF INSURANCE COMPANY, LTD., NANCY AHERN, JOHN DOES 1 THROUGH 10, Defendants.	Cause No.: BDV-14-001 **ORDER DENYING DEFENDANTS' SUPPLEMENTAL MOTIONS FOR SUMMARY JUDGMENT** [Filed: January 9, 2018]

On May 1, 2017, Defendants BNSF Railway Company ("BNSF") and Nancy Ahern ("Ahern") filed their Combined Supplemental Motion for Summary Judgment. Plaintiff Robert Dannels filed his response brief in opposition to the motion on May 25, 2017. De-

fendants filed their reply brief in support of their motion on June 13, 2017. The Court heard oral argument on the motion on January 3 and 4, 2018. Accordingly, Defendants' motion is ripe for ruling. Defendants' motion is denied for the reasons set forth below.

I. Background and Facts

As indicated by the summary judgment standard set forth in greater detail below, a court must draw all reasonable inferences and view all the evidence in the light most favorable to the nonmoving party. The Court has recounted the background facts in response to many motions already and will not reiterate them all here.

Dannels worked for BNSF for nearly 20 years, primarily in Havre, Montana. On March 17, 2010, Dannels suffered a workplace injury to his lower back. In 2010, Dannels submitted a written injury report to BNSF, underwent medical care, and sued the Defendants. On February 13, 2013, the jury in the FELA case returned a verdict in Dannels' favor. The trial court denied BNSF's motion for a new trial. BNSF then settled without taking an appeal. Dannels filed the present bad faith lawsuit on January 2, 2014.

II. Summary Judgment Standard

Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party demonstrates it is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c). The purpose of summary judgment is to encourage judicial economy through the elimination of unnecessary trials. *Bonilla v. University of Mont.,* 2005 MT 183, ¶ 14, 328 Mont. 41, 116 P.3d 823. Where reasonable minds could reach only one conclusion, questions of fact become questions for the court to decide instead of a

jury. *Brohman v. State,* 230 Mont 198, 202, 749 P.2d 67, 70 (1988). However, "summary adjudication should never be substituted for a trial if a material factual controversy exists." *Bonilla,* ¶ 14.

To meet its initial burden, the moving party must demonstrate that, viewing the evidence in the light most favorable to the non-moving party, no genuine issue of material fact exists. *Roy v. Blackfoot Tel. Coop.,* 2004 MT 316, ¶ 11, 324 Mont. 30, 101 P.3d 301. Once satisfied, the burden shifts to the non-moving party, who must then establish that a genuine issue of material fact exists with more than mere denial and speculation. *Id.* Once a court concludes that no genuine issue of material fact exists, it must then determine whether the moving party is entitled to judgment as a matter of law. *Id.* "A suspicion, regardless of how particularized it may be, is not sufficient to sustain an action or to defeat a motion for summary judgment. Unsupported conclusory or speculative statements do not raise a genuine issue of material fact." *Gentry v. Douglas Hereford Ranch, Inc.,* 1998 MT 182, ¶ 31, 290 Mont. 126, 962 P.2d 1205. At the summary judgment stage, a court must "draw all reasonable inferences and view all of the evidence in the light most favorable to the nonmoving party." *Johnston v. Centennial Log Homes & Furnishings, Inc.*, 2013 MT 179, ¶ 24, 370 Mont. 529, 305 P.3d 781, *citing Fasch v. M.K.* Weeden *Constr., Inc.*, 2011 MT 258, ¶ 16, 362 Mont. 256, 262 P.3d 1117.

II. Discussion

Defendants argue they are entitled to summary judgment because (1) Dannels' bad faith claims are preempted by the FELA, (2) application of Dannels' bad faith claims in this case violates Defendants' constitutional right to have a jury decide the issues in the

underlying case, (3) liability in the underlying FELA case was never reasonably clear, (4) Defendants had a reasonable basis in law and fact for contesting Dannels' underlying claim, and (5) Dannels' investigation and leveraging allegations fail.

A. Preemption

Defendants submit a lengthy preemption analysis arguing "[i]n the present case, both field and conflict preemption apply [to Dannels' bad faith claims] because the FELA provides the exclusive remedy against railroad-employers by railroad employees working in interstate commerce." This Court will not undertake the preemption analysis Defendants urge because the Montana Supreme Court has already done so and ruled against BNSF on the same arguments.

In *Reidelbach v. Burlington Northern and Santa Fe Ry.* Co., 2002 MT 289, 312 Mont. 498, 60 P.3d 418, the plaintiff suffered a workplace injury while employed by BNSF. BNSF's claims department steered Reidelbach clear of a FELA claim under the assurance that it would treat him reasonably. When this did not happen, Reidelbach brought FELA and bad faith claims against BNSF and its adjuster. BNSF moved to dismiss the bad faith claims, arguing federal preemption. The trial court granted BNSF's motion and Reidelbach appealed to the Montana Supreme Court.

The Montana Supreme Court noted that Reidelbach's bad faith allegations, the same brought by Dannels in this case, were grounded in state law. It held that the claims were not expressly preempted or impliedly preempted. *Reidelbach,* ¶¶ 23, 26. Finally, the Montana Supreme Court held Montana's bad faith

provisions, and imposing them on BNSF, does not conflict with the FELA:

> Reidelbach's state claims are distinct and separate from his physical injury FELA claim, the value of which will be decided in court under FELA law. The railroad's settlement practices do not arise from the railroad's negligence in the workplace, and will not influence the amount of FELA recovery Reidelbach might receive when he has his day in court. Conversely, proof of Reidelbach's physical, on-the-job injury and the railroad's alleged negligence are not elements of Reidelbach's state claims and will not affect the value of or damages for his state claims.
>
> . . .
>
> Compliance with the state laws upon which Reidelbach bases his state claims and compliance with the FELA are not mutually exclusive. The railroad can easily satisfy both its duty and obligation to provide a safe working environment for its employees under the FELA, and its state-imposed obligation to engage in fair, good faith claims practices once an employee has been injured...[G]ood faith was not what the FELA was created to accomplish. Therefore, imposition of that obligation is neither within "the ambit of the federal statute" nor does it conflict with or stand as an obstacle to the accomplishment and execution of the purpose or objective of the FELA. As such, imposing such obligations through enforcement of state statutes or state common law is not preempted.

Reidelbach, ¶¶ 44, 52.

This court is bound to follow *Reidelbach*. *Reidelbach* disposes the Defendants' preemption arguments in Dannels' favor. Accordingly, Defendants' motion, to the extent it is premised on preemption, is **denied**.

B. Constitutional Arguments

Defendants contend the purpose of Montana's Unfair Trade Practices Act ("UTPA") is to regulate trade practices in the business of insurance. They then leap to the conclusion that "[i]t is both a mistake of logic and unconstitutional to equate a self-insured with an insurance company and to impose the same duties upon the self-insured that a state may have legitimate police power for imposing on a company doing business in insurance." Defendants couch their constitutional arguments as a violation of the right to due process, as applied to self-insureds. Defendants vaguely refer to substantive due process (and its corresponding level of scrutiny), fundamental rights, and strict scrutiny.

Without any compelling argument, Defendants presume that imposition of the UTPA on BNSF's claims-handling function infringes on Defendants' constitutional rights of access to the courts and a jury trial in the underlying FELA matter. However, the *prima facie* case for bad faith or UTPA case is distinctly different than it is for the underlying tort claim, Just as Defendants were entitled to a jury trial to address the underlying FELA claim, they are entitled to a jury trial on the UTPA claims. The present case, therefore, does not accrue "in retaliation for exercising one's right to a jury trial."

BNSF is self-insured for claims like Dannels' underlying personal injury claims. An employee injured

in the employ of a self-insured employer constitutes a third-party claimant. *Suzor v. International Paper* Co., 2016 MT 344, ¶¶ 22-24, 386 Mont. 54, 386 P.3d 584. Montana law permits a third-party claimant, like Dannels, to pursue common law bad faith claims against the insuring entity. *Brewington v. Employers Fire Ins.* Co., 1999 MT 312, 297 Mont. 243, 992 P.2d 237. Further, Montana's UTPA likewise bestows statutory causes of action on third-party claimants:

> An insured or a third-party claimant has an independent cause of action against an insurer for actual damages caused by the insurer's violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201.

§ 33-18-242(1), MCA. "Insurer" in the foregoing context includes "a person, firm, or corporation utilizing self-insurance to pay claims made against them." § 33-18-242(8), MCA. Dannels asserts that, in investigating, adjusting, and defending the underlying action, Defendants violated the common law and statutory bad faith duties imposed on it under Montana law. Complaint and Jury Demand, ¶¶ 17, 24, 27, 33-34.

Ordinarily, confronted with a constitutional challenge, trial courts must determine the level of scrutiny to be applied. BNSF insists strict scrutiny applies. Dannels argues the rational basis test applied to substantive due process challenges applies. See *Linder v. Smith,* 193 Mont. 20, 629 P.2d 1187 (1981); *In the Matter of C.H.*, 210 Mont. 184, 194, 683 P.2d 931, 936 (1984). However, in this case, the Court need not navigate the scrutiny waters because "[t]he extent to which the Court's scrutiny is heightened depends both on the nature of the interest and the degree to which it is infringed." *Wadsworth v. State,* 275 Mont. 287,

302, 911 P.2d 1165, 1173 (1996). A constitutional deprivation argument presupposes a constitutional infringement. Absent an infringement, a constitutional challenge cannot lie, regardless of which level of scrutiny would apply in the face of a proper challenge. Here, Defendants have not established an infringement to a constitutional right. This deficit lies in Defendants' erroneous melding of the FELA and UTPA issues at play.

The Montana Supreme Court long ago noted the distinctions between issues arising in a workplace injury case versus issues triggered under bad faith principles. In *Hayes v. Aetna Fire Underwriters*, 187 Mont. 148, 609 P.2d 257 (1980), the Montana Supreme Court noted that a bad faith claim does not derive out of the workers' employment. *Hayes*, 187 Mont. at 155, 609 P.2d at 261. The Court described that the right to bring an action for bad faith tortious conduct:

> is predicated on an act after the injury and during the settlement of the claim. The insurance carrier is no longer the "alter ego" of the employer, but rather is involved in an independent relationship to the employee when committing such tortious acts.
>
> ***
>
> The injury for which remedy is sought in the instant case is the emotional distress and other harm caused by the defendants' intentional acts during the investigation and during the course of payment of the claim. This claimed injury was distinct in time and place from the original on-the-job physical injury . . . .

Hayes, 187 Mont. at 155-56, 609 P.2d at 261 (citation omitted).

The Montana Supreme Court more recently affirmed the notion articulated in *Hayes.* In *Graf v. Continental Western Ins. Co.*, 2004 MT 105, 321 Mont. 65, 89 P.3d 22, Graf was rear-ended at an intersection and filed a personal injury lawsuit against the at-fault driver and his employer. The jury returned a defense verdict and the case later settled on appeal. After resolving the underlying matter, Graf filed a bad faith case against the defendants' insurer. The insurer moved for summary judgment, arguing the underlying personal injury defense verdict was determinative and barred the subsequent bad faith claim. Like the Defendants argue here, the insurer in *Graf* argued that permitting the subsequent bad faith claim "would eviscerate the jury's role in our system of justice." *Graf*, ¶ 10. The Montana Supreme Court disagreed.

Like the Defendants here, the insurer in *Graf* presumed that a bad faith case comingles the underlying issues and relitigates the underlying claim, *Graf*, ¶ 12. The Montana Supreme Court rejected this erroneous premise as "[t]he issues in a UTPA claim are separate from the Issues in the underlying claim." *Graf, ¶* 12. In the underlying personal injury action, the issue is whether the defendant negligently caused the inciting event and resulting injuries. *Graf,* ¶ 15. Conversely, in a UTPA claim, "the issue is whether the insurance carrier conducted a reasonable investigation and attempted in good faith to effectuate settlement of the claim when liability had become reasonably clear." *Graf*, ¶ 15. The UTPA focuses on the insurer's knowledge, actions, and inactions which the jury is not privy to in the underlying claim. *Graf*, ¶ 17. Thus, the UTPA is designed to hold the insurer accountable

for the claim processing, rather than the mechanism of the underlying personal injury. Adopting Defendants' position would defeat the public policy embodied in the UTPA—i.e., to retrospectively measure insurer conduct against the standards adopted by the Legislature in enacting the UTPA. *Graf*, ¶ 18,

The Montana Supreme Court echoed these sentiments in *Peterson v. Doctors'* Co., 2007 MT 264, 339 Mont. 354, 170 P.3d 459. Therein, faced with an evidentiary issue pitting an underlying personal injury claim against a subsequent bad faith case, the Montana Supreme Court noted:

> Ultimately, this MUTPA action was not about the amount of the settlement which TDC paid to the Petersons, but, rather, about **the process used by TDC before entering the settlement**.
>
> . . . .
>
> The essence of a claim under § 33-18-201, MCA, is that an insurer, given information available to it, has acted unreasonably in adjusting a claim, perhaps by failing to investigate, failing to communicate or failing to negotiate in good faith. Section 33-18-201, MCA, seeks to protect parties from such acts, and the relevant issue is almost universally **how the insurer acted given the information available to it**.

Peterson, ¶¶ 39, 43 (emphasis added). Finally, *Reidelbach,* referenced in greater detail above, is consistent with the foregoing authorities holding that the state law bad faith claims are "distinct and separate" from the underlying physical injury, FELA claims. *Reidelbach,* ¶ 44.

The parties tried Dannels' underlying FELA claims to a jury. In other words, BNSF invoked its right to a jury trial in the underlying action and the trial did not implicate the duties flowing under the UTPA.

Montana law has required insurers to heed the duties imposed under the UTPA for decades without any suggestion of constitutional infirmity. Since 1987, the UTPA has extended to self-insureds under the same long-standing bad faith principles. The UTPA treats BNSF exactly as it treats other entities insuring risks in Montana. The UTPA, and foregoing authorities, distinguish a UTPA claim from an FELA claim. These authorities expressly authorize Dannels' bad faith claims against the Defendants. Given the distinct issues and damages involved (as recognized in *Hayes*, *Graf*, *Peterson*, and *Reidelbach)*, Defendants cannot demonstrate a constitutional infringement justifying the constitutional analysis they seek. Accordingly, Defendants constitutional arguments lack merit.

C. Factual Arguments

The final three bases the Defendants articulate in support of their motion implicate disputed issues of fact—i.e., whether liability was reasonably clear, whether Defendants had a reasonable basis in law and fact for contesting Dannels' claims, and the propriety of Defendants' investigation and settlement negotiations.

Reasonableness is generally a question of fact. As such, it is for the trier of fact to weigh the evidence and judge the credibility of witnesses in determining whether an insurer's conduct was reasonable. In cases like this, reasonableness is not a determination

that should be made as a matter of law. *DeBruycker v. Guaranty Nat. Ins.* Co., 266 Mont. 294, 298, 880 P.2d 819, 821 (1994). Several years after *DeBruycker*, the Montana Supreme Court clarified this standard:

> while the assessment of reasonableness generally is within the province of the jury (or the court acting as fact-finder), reasonableness is a question of law for the court to determine when it depends entirely on interpreting relevant legal precedents and evaluating the insurer's proffered defense under those precedents.

Redies v. Attorneys Liability Protection Soc., 2007 MT 9, ¶ 35, 335 Mont. 233, 150 P.3d 930 (citations omitted).

Further, as the moving party, Defendants must exclude any real doubt as to the existence of any genuine issue of material fact by making a clear showing of the truth. If there is any doubt whether a genuine issue of material fact exists, that doubt must be resolved for the party opposing summary judgment. *Lorang v. Fortis Ins.* Co., 2008 MT 252, ¶¶ 37-38, 345 Mont. 12, 192 P.3d 186. "[T]he court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses." *Fasch v. M.K. Weeden Const., Inc.,* 2011 MT 258, ¶ 17, 362 Mont. 256, 262 P.3d 1117. All reasonable inferences from the factual record must be drawn in favor of the non-moving party. *Clark v. Eagle Systems, Inc.*, 279 Mont. 279, 284, 927 P.2d 995, 998 (1996). Summary judgment is an extreme remedy which should never take the place of a trial. *Clark*, 279 Mont. at 283, 927 P.2d at 997. Disputed issues of

fact remain regarding the conduct at issue, Defendants' knowledge, and the reasonableness of the actions the Defendants took,

As for whether liability was reasonably clear, Dannels claims other BNSF employees concealed the pipe when he was plowing snow in the parking lot, without identifying or warning of the lurking hazard. BNSF would, therefore, be held responsible for the negligence of these employees, particularly given the low liability threshold under the FELA (BNSF is liable if its negligence played any part, even the slightest, in causing damages).

Dannels claims that Defendants failed to investigate his claim promptly and fully based on all available information, and then failed to make reasonable settlement offers promptly and fairly given the information in Defendants' possession. Dannels argues Defendants evaluated his loss through the litigation process and acknowledged the likelihood of being held accountable. Defendants set their loss reserves for Dannels' claim between $350,000 and $650,000, but did not advance lost wages to Dannels for more than three years during the litigation, which Dannels asserts is evidence of bad faith. Dannels alleges it was unreasonable for Defendants to withhold wage losses as they were incurred.

Dannels claims that Defendants made no settlement offers for over two years and, the offers they eventually made were for only a fraction of the amount the jury returned after considering all the evidence. Dannels claims the information in Defendants' possession indicated Dannels was becoming increasingly depressed and stressed about the ongoing litigation, including the financial stress and delays experienced in resolving his claims. Dannels argues

that Defendants violated their own claims standards in adjusting his FELA claims. Dannels alleges Defendants employ the same unlawful tactics when other railroad workers have had to make claims for injuries.

Dannels further argues that, at a minimum, liability was clear after the jury's 11-1 verdict that BNSF was negligent and 12-0 verdict that this negligence caused $1.7 million damages. Despite this verdict, Dannels claims Defendants still denied his request for *Ridley* payments. Dannels argues this post-verdict refusal alone violates the UTPA and bears on Defendants' motives and credibility concerning other conduct.

The evidence the Defendants presented in the underlying FELA trial is not the proper basis to establish, as a matter of law, whether they acted reasonably. In the bad faith suit, the focus is on what the Defendants knew before trial and during the investigative settlement stage. Whether a person acted in bad faith is distinct from the jury's ultimate consideration of the merits in the underlying case because, in part, the jury in the underlying case is not privy to the investigative reports, evaluations and correspondence that are relevant in the bad faith case. See *Graf*, ¶ 17.

This Order addresses some, but not all, the disputed issues of fact. There are genuine issues of material fact, rendering the case inappropriate for summary judgment. Whether liability was reasonably clear, whether Defendants had a reasonable basis in law and fact for contesting Dannels' claims, and whether Defendants' investigation and settlement negotiations were proper are all for the jury to decide.

III. Conclusion

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants BNSF and Nancy Ahern's Combined Supplemental Motion for Summary Judgment is **DENIED.**

Dated this 9th day of January, 2018.

s/ Katherina M. Bidegaray

Katherina M. Bidegaray

District Court Judge

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2

This Constitution, and the laws of the United States which shall be made in pursuance therof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

45 U.S.C. § 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Mont. Code Ann. § 33-18-201 — Unfair claim settlement practices prohibited.

A person may not, with such frequency as to indicate a general business practice, do any of the following:

. . .

(2) fail to acknowledge and act reasonably prompt upon communications with respect to claims arising under insurance policies;

(3) fail to adopt and implement reasonable standard for the prompt investigation of claims arising under insurance policies;

(4) refuse to pay claims without conducting a reasonable investigation based upon all available information;

. . .

(6) neglect to attempt in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(7) compel insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds;

. . .

(13) fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(14) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

Mont. Code Ann. § 33-18-242 — Independent cause of action—burden of proof.

(1) An insured or a third-party claimant has an independent cause of action against an insurer for actual damages caused by the insurer's violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201.

(2) In an action under this section, a plaintiff is not required to prove that the violations were of such frequency as to indicate a general business practice.

. . .

(4) In an action under this section, the court or jury may ward such damages as were proximately caused by the violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201. Exemplary damages may also be assessed in accordance with 27-1-221.

. . .

(8) As used in this section, an insurer includes a person, firm, or corporation utilizing self-insurance to pay claims made against them.