No.

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

ROBERT DANNELS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, establishes a "uniform," "comprehensive," and "exclusive" federal regime governing railroads' liability for employee on-the-job injuries. *N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 150-51 (1917). More than a century of this Court's cases hold that FELA "liability can neither be extended nor abridged by common or statutory laws of the state." *N.Y. Cent. & Hudson R.R. Co.* v. *Tonsellito*, 244 U.S. 360, 362 (1917).

In the decision below, the Montana Supreme Court upheld state-law duties that interfere with and deprive defendants of FELA defenses. Specifically, Montana state law requires a defendant to enter into a "prompt, fair, and equitable settlement" when federal liability under FELA becomes "reasonably clear," even if it has federal defenses that may ultimately prove to be meritorious. If the FELA defendant fails to settle and pay in that circumstance, it can be sued for emotional distress and punitive damages. The Montana Supreme Court held that FELA does not preempt such claims because FELA does not provide a remedy for "unfairly" refusing to settle, and therefore state law may "fill the space" left by Congress.

The question presented is:

Whether FELA preempts state-law duties that require a defendant to settle and pay FELA claims even when the defendant has non-frivolous defenses to liability under FELA.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding below are named in the caption.

Pursuant to this Court's Rule 29.6, undersigned counsel states that petitioner BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Dannels v. *BNSF Ry. Co.*, No. DA 19-0343, 483 P.3d 495 (Mont. Mar. 23, 2021);

Dannels v. *BNSF Ry. Co.*, No. BDV-14-001 (Mont. 8th Judicial Dist. Ct. May 14, 2019);

BNSF Ry. Co. v. *Mont. Eighth Judicial Dist. Ct.*, 139 S. Ct. 2634 (2019) (petition dismissed pursuant to Supreme Court Rule 46);

BNSF Ry. Co. v. *Mont. Eighth Judicial Dist. Ct.*, No. OP 18-0693, 2019 WL 1125342 (Mont. Mar. 12, 2019);

Ahern v. *Eighth Judicial Dist. Ct.*, No. OP 18-0054, 2018 WL 4094463 (Mont. Feb. 20, 2018).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner BNSF Railway Company ("BNSF") respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court (Pet. App. 1a-54a) is reported at 483 P.3d 495. The opinion of the district court denying petitioner's motion for summary judgment (Pet. App. 113a-127a) is unreported.

JURISDICTION

The judgment of the Montana Supreme Court was entered on March 23, 2021. Pet. App. 1a. Pursuant to this Court's orders of March 19, 2020, and July 19, 2021, the time for filing a petition for a writ of certiorari has been extended to 150 days from the date of the judgment, thus to and including August 20, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision below is a final judgment rendered by the highest court of a State, and addresses whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, preempts the bad-faith laws of the State of Montana, as applied to FELA defendants.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All pertinent constitutional and statutory provisions are reproduced in the Petition Appendix at 150a-154a.

STATEMENT

Since FELA was enacted in 1908, this Court has repeatedly held that it establishes a "comprehensive" and "exclusive" framework for the "responsibility of interstate carriers by railroad to their employees injured in such commerce." *N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 151-52 (1917) (internal quotation marks omitted). FELA is not a "workers' compensation statute," and it does not "make the employer the insurer of the safety of his employees." *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994). Instead, FELA adopts a tort-based system that makes railroads liable for injuries caused to their workers due to negligence. *See* 45 U.S.C. § 51.

Notably, FELA does not "leave the states free to require compensation where the act withholds it," *Winfield*, 244 U.S. at 150, and FELA's remedial scheme can be neither "extended nor abridged by common or statutory laws of the state," *N.Y. Cent. & Hudson R.R. Co.* v. *Tonsellito*, 244 U.S. 360, 362 (1917). Nor may States dictate "what defenses" can and can "not be properly interposed to suits under [FELA]." *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952).

Because FELA's central purpose was "to create uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees," *Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (internal quotation marks omitted), this Court has consistently deemed preempted any "state law trenching on the province of the Act," *S. Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 371 (1953). And it has held, time and again, that states are not

free to supplement purported gaps in FELA by imposing additional liability and state-law duties. *See, e.g.*, *Tonsellito*, 244 U.S. at 361-62.

The Montana Supreme Court's decision below repudiates all of these precedents. The Montana Supreme Court's decision treats the railroad as the worker's insurer and imposes state-law duties to settle a FELA case once liability is "reasonably clear." Mont. Code Ann. § 33-18-201(6). The Montana Supreme Court characterized it as "bad faith" for a defendant to continue raising non-frivolous FELA defenses at that point, and found it "ironic" and "inconceivable" that an employee would have "no remedy for a railroad's intentional claims-handling conduct." Pet. App. 14a-15a, 19a. The Montana Supreme Court held that in order to "protect[] Montana citizens," state law could "fill the space" left by Congress and add new substantive duties requiring FELA defendants to waive their federal defenses or face liability for emotional distress and punitive damages. *Id.* at 15a. The Montana Supreme Court's decision thus subverts the negligence-based framework and national uniformity FELA was enacted to promote.

The Montana Supreme Court's decision reinforces a stark split between the state and federal courts in the Ninth Circuit in Montana on the scope of FELA preemption. The Montana Supreme Court allowed liability for emotional distress and punitive damages for unfair settlement practices, but the Ninth Circuit has held that FELA preempts any claim for punitive damages, *Wildman* v. *Burlington N. R.R. Co.*, 825 F.2d 1392, 1394 (9th Cir. 1987), as well as state-law claims alleging misconduct including fraud during the negotiation of a FELA settlement, *see Counts* v. *Burlington N. R.R. Co.*, 896 F.2d 424, 426 (9th Cir. 1990).

The Ninth Circuit also has held that FELA preempts state-law claims for intentional infliction of emotional distress. *Stiffarm* v. *Burlington N. R.R. Co.*, 81 F.3d 170 (Table), 1996 WL 146687 (9th Cir. 1996) (per curiam). And the federal district court in Montana has squarely held that FELA preempts Montana's state-law claims for unfair settlement practices. *See Toscano* v. *Burlington N. R.R. Co.*, 678 F. Supp. 1477, 1479 (D. Mont. 1987).

Therefore, liability under FELA in Montana turns on whether a railway worker chooses to file a complaint in state or federal court. Moreover, although *Toscano* is a district court decision, there is no realistic prospect of further percolation on these issues in federal court. Given FELA's express authorization of concurrent jurisdiction, 45 U.S.C. § 56, and the statutory prohibition on removing a FELA case from state court to federal court, 28 U.S.C. § 1445(a), railway workers in Montana can always file in state court to secure the advantage of Montana's novel scheme and the opportunity to recover punitive and non-economic emotional distress damages that are foreclosed in federal court.

This Court's review is essential to restore nationwide uniformity in FELA's application. Review is also necessary to protect the integrity of this Court's precedent establishing FELA as a comprehensive and exclusive remedy for railroad worker on-the-job injuries, and to resolve the conflict in how FELA actions are litigated in the federal and state courts of Montana.

A. FELA's Comprehensive Framework For Railroad Liability

Congress enacted FELA as a comprehensive federal remedy for railroad employees injured in on-the-

job accidents. Congress "was dissatisfied with the common-law duty of the master to his servant" and sought to reduce disputes between railroads and their employees to "the single question whether negligence of the employer played any part … in the injury or death which is the subject of the suit." *Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 500, 507-08 (1957). It accomplished that objective by enacting FELA, which "withdraw[s] all injuries to railroad employees in interstate commerce from the operation of varying state laws, and … appl[ies] to them a national law having a uniform operation throughout all the states." *Winfield*, 244 U.S. at 150; *see also* 1 M.G. Roberts, *Federal Liabilities of Carriers* § 535 (1918) (differing state laws "would defeat one of the main objects of [FELA]—one uniform rule of liability in all the states where a carrier by railroad is engaged in interstate commerce"); 5 John R. Berryman, *Sutherland on Damages* § 1304 (4th ed. 1916) ("the purpose of [FELA] was to secure uniformity with respect to the liability of interstate carriers to their employees, so that their respective rights and liabilities might be determined in accordance with a single rule instead of forty-eight").

Crucially, FELA does not "make the employer the insurer of the safety of his employees while they are on duty." *Gottshall*, 512 U.S. at 543. FELA is not a "workers' compensation statute." *Id.* Instead, the basis of any FELA claim is negligence: Liability is imposed for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees" of a railroad, "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." 45 U.S.C. § 51.

FELA's application is "uniform … throughout the country." *Dice*, 342 U.S. at 361; *see also Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942) (emphasizing that FELA "requires uniform interpretation"). As this Court has consistently explained, "[o]ne of the purposes of the [FELA] was to create uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees." *Liepelt*, 444 U.S. at 493 n.5 (internal quotation marks omitted); *Erie R.R. Co.* v. *Winfield*, 244 U.S. 170, 172 (1917) (FELA "is intended to operate uniformly in all the states," and "is both paramount and exclusive.").

To that end, the standard for liability under FELA is governed by federal law. *See Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). A plaintiff bringing suit under FELA must prove that "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506. An employer is not liable in the absence of its own negligence, and the "fact that injuries occur" does not automatically create a viable cause of action for injured employees. *Gottshall*, 512 U.S. at 543 (internal quotation marks omitted).

As with liability, damages under FELA are governed by uniform federal law. *Liepelt*, 444 U.S. at 493 ("[Q]uestions concerning the measure of damages in an FELA action are federal in character."). An injured FELA employee who proves negligence on the part of his employer is entitled to "such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power." *Mich. Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65 (1913). Injured employees are entitled to damages for emotional distress "caused by the negligent conduct of their employers that threatens them imminently with physical

impact." *Gottshall*, 512 U.S. at 556. Courts generally agree that punitive damages are not available under FELA. *See, e.g.*, *Dutra Grp.* v. *Batterton*, 139 S. Ct. 2275, 2284-85 (2019) (stating that FELA does not authorize punitive damages); *Wildman*, 825 F.2d at 1394; *Kozar* v. *Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1241-42 (6th Cir. 1971).

FELA also regulates a railroad's claims-handling practices by imposing penalties on any attempt to prevent employees and other persons from "furnishing voluntarily information" to the plaintiff. 45 U.S.C. § 60; *see also* S. Rep. No. 76-661, at 5 (1939) (noting that "railroads maintain well-organized and highly efficient claim departments," allowing them to "obtain[ ] all available information considered necessary" to their defense, but that some railroads had imposed rules to prevent plaintiffs from obtaining "information necessary to the determination of the question of liability").

B. Montana's Statutory And Common Law Claims For Unfair Settlement Practices

Montana has adopted a regime that transforms railroads into the insurers of railway workers, fundamentally altering the railroad-worker relationship under FELA and imposing duties on the railroad to waive its FELA defenses, thereby obstructing the operation of FELA's uniform tort-based scheme.

Like many states, Montana imposes a duty of good faith and fair dealing on an insurer in its dealings with the insured pursuant to the insurance contract. *See, e.g.*, *Stephens* v. *Safeco Ins. Co. of Am.*, 852 P.2d 565, 568 (Mont. 1993); Mont. Code Ann. §§ 33-18-201, 33-18-242(1) (the "Unfair Trade Practices Act", or "UTPA"); *cf.* Restatement (Second) of Contracts § 205

(1981). An insurer accordingly must act in good faith in paying and defending claims for coverage by the insured.

But Montana also has an anomalous rule that an injured party—that is, not the insured but a third-party plaintiff who is suing the insured—may sue the tortfeasor's insurer directly if the insurer does not comport with a duty of good faith and fair dealing in *its dealings with* the *plaintiff*, notwithstanding that the insurer and the plaintiff lack any contractual relationship. *See* Mont. Code Ann. § 33-18-242(1). Montana has imposed those duties even on a defendant that self-insures instead of purchasing traditional third-party insurance. *See id.* § 33-18-242(8); *Brewington* v. *Emp'rs Fire Ins. Co.*, 992 P.2d 237, 240-41 (Mont. 1999); *Ogden* v. *Mont. Power Co.*, 747 P.2d 201, 205 (Mont. 1987) (noting recent legislation applying statutory bad-faith claims "to actions brought by third party claimants against self-insurers").

Therefore, in Montana, a FELA defendant can be sued for breaching a state-law duty to act in "good faith" towards a worker when investigating and defending itself against the worker's FELA claim. *See* Pet. App. 9a, 13a. Montana thus imposes a state-law duty on a FELA defendant effectively to act as the worker's insurer vis-à-vis a FELA claim. The Montana Supreme Court has adhered to this construction of FELA for almost 20 years. *See Reidelbach* v. *Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418, 430 (Mont. 2002).

The state-law duties Montana imposes on a FELA defendant are wide-ranging. First, a defendant owes an obligation to "settle in an appropriate case." *Gibson* v. *W. Fire Ins. Co.*, 682 P.2d 725, 730 (Mont. 1984). Specifically, the defendant must "attempt in good

faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." Mont. Code Ann. § 33-18-201(6). The defendant also has a duty to "conduct[ ] a reasonable investigation based upon all available information." *Id.* § 33-18-201(4). And the defendant must pay the claimant's medical expenses and lost wages pending a settlement or judgment on the underlying claim when liability is "reasonably clear." *DuBray* v. *Farmers Ins. Exch.*, 36 P.3d 897, 900 (Mont. 2001); *see also Ridley* v. *Guar. Nat'l Ins. Co.*, 951 P.2d 987, 992 (Mont. 1997).

Moreover, under Montana law, even if a defendant ultimately *prevails* at a jury trial, it can *still* be subject to a follow-on claim that it breached the good-faith settlement obligation by not acceding to a plaintiff's demand and settling the case earlier. *See Graf* v. *Cont'l W. Ins. Co.*, 89 P.3d 22, 26 (Mont. 2004) ("A defense verdict in the negligence suit is not tantamount to a jury finding that the insurer did not violate the UTPA."). Nor is there any opportunity for a FELA defendant to settle both a FELA claim and a so-called "bad-faith" claim together because even attempting to do so could itself trigger liability under Montana law. *See Shilhanek* v. *D-2 Trucking, Inc.*, 70 P.3d 721, 726 (Mont. 2003) (finding violation based on offer of settlement conditioned on "a full and final release of all claims against [an] insured"), *modified*, 79 P.3d 1094 (Mont. 2003); *Watters* v. *Guar. Nat'l Ins. Co.*, 3 P.3d 626, 638 (Mont. 2000), *overruled in part on other grounds by Shilhanek*, 70 P.3d 721 (Mont. 2003) (same).

Montana thus imposes a state-law duty on a FELA defendant to waive its bona fide federal defenses and to settle with and pay the plaintiff, as soon

as liability becomes merely "reasonably clear." Otherwise, the defendant faces additional state-law liability, including for causing emotional distress and for punitive damages.

C. Factual Background And Procedural History

1. Petitioner BNSF operates a railroad in 28 states, including Montana. *See BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1554 (2017). Respondent Robert Dannels sued BNSF under FELA for negligently assigning him physical work during his 20-year employment with BNSF, leading to "cumulative trauma" that made him susceptible to permanent disability. Pet. App. 148a. BNSF denied liability and defended itself on the merits. The case proceeded to a trial, and the jury returned a verdict awarding Dannels $1.7 million for his injuries. After the trial court denied BNSF's motion for a new trial, the parties reached a full and final written settlement for the full amount of the verdict of $1.7 million in June 2013. *Id.* at 69a.

Six months later, after BNSF had paid the settlement amount, Dannels filed this suit in Montana state court against BNSF and BNSF claims adjuster Nancy Ahern, alleging that "BNSF improperly investigated, adjusted, and defended against his underlying FELA action, thereby violating the common law and statutory duties imposed under Montana's bad faith laws." Pet. App. 10a. Specifically, Dannels alleged that BNSF violated Montana law "by failing to advance his lost wages, failing to reasonably investigate and adjust his claim, and failing to offer him alternative or permanent employment." *Id.* at 4a; *see also id.* at 136a-137a (failing to advance wages while the FELA suit was pending); *id.* at 137a (failing to "effectuate a prompt, fair and equitable settlement"). Dannels

sought compensatory damages for mental distress and punitive damages. *Id.* at 144a-145a.

BNSF moved for summary judgment, arguing that Dannels's state-law claims were preempted by FELA and that a "railroad's substantive duties are defined by federal, not state law," and that "federal law preempts efforts to control the settlement of a FELA claim through state law." Defs.' Combined Br. in Supp. of Supplemental Mot. for Summ. J. 5. The trial court denied that motion, citing the Montana Supreme Court's decision in *Reidelbach*, 60 P.3d 418, which held that FELA does not preempt state-law claims for unfair settlement practices. Pet. App. 118a. BNSF filed a petition seeking interlocutory review, which the Montana Supreme Court denied, citing *Reidelbach* and stating that if reevaluation of *Reidelbach* were warranted, "the normal appeal process is certainly adequate for that purpose." *Id.* at 111a.

2. As the case progressed, Dannels sought sweeping discovery from BNSF in support of his so-called "bad faith" claims, including large amounts of confidential and privileged documents relating to BNSF's litigation and settlement of FELA claims in Montana and across the United States. These included internal analyses of Dannels's FELA claim, monthly summaries of pending FELA litigation prepared by BNSF in-house counsel, and confidential materials concerning BNSF's existing reserves and procedures for setting reserve amounts for individual FELA cases. Pet. App. 78a. BNSF repeatedly objected to producing these materials, but the trial court consistently overruled those objections. *Id.* at 79a-80a. Dannels ultimately moved for sanctions based on BNSF's alleged failure to produce the materials. The trial court granted that application and imposed a default judgment against

BNSF on liability and causation and ordered the parties to proceed to trial on the issue of damages only.

BNSF filed a second petition for a writ of supervisory control in the Montana Supreme Court, reiterating that FELA preempts Dannels's claims. The Montana Supreme Court denied that petition too, holding there was "no reason why a normal appeal is an inadequate process for addressing BNSF's request to revisit … *Reidelbach*." Pet. App. 61a. Justice McKinnon dissented, stating that "there is ample federal authority, not discussed in *Reidelbach*, which appears to provide FELA is the exclusive remedy for injured railroad workers." *Id.* at 65a. Justice McKinnon also added that the case had "grown even more cumbersome because the District Court has entered a default when there still lingers a question of preemption," and emphasized that the court was "affirming an order for sanctions requiring BNSF to produce documents that are otherwise undiscoverable, *but for the case's status as a UTPA action*." *Id.* at 66a. For those reasons, Justice McKinnon would have invited further briefing.

On the eve of a contempt hearing in which the trial court had ordered BNSF to show cause why it should not be further sanctioned for discovery issues, the parties reached a high-low settlement in which BNSF agreed to pay Dannels $2.25 million "'regardless of the outcome of any appeal.'" Pet. App. 5a. BNSF preserved its right to appeal the preemptive scope of FELA, and, if the judgment is undisturbed after all appeals, will pay Dannels an additional $5.15

million. *Id.* If the district court's judgment is overturned, however, BNSF will have no further liability to Dannels beyond the $2.25 million] payment. *Id.*[1]

3. A divided Montana Supreme Court held that FELA does not preempt Montana's state-law unfair settlement practices regime.

The majority first determined that express preemption does not apply because FELA does not have an express preemption provision. Pet. App. 10a-11a. The majority then concluded that field preemption did not apply because FELA has no "administrative regulations" and because Congress had not intended "to regulate through FELA the entire field of injuries and claims a railroad employee may have." *Id.* at 11a-12a. According to the majority, field preemption did not apply because the underlying FELA claim focused on BNSF's workplace negligence while the compelled-settlement regime focuses on "the process" BNSF used "before entering settlement." *Id.* at 12a. The majority opined that "[g]iven the humanitarian purpose of FELA, we find it inconceivable … that Congress intended the FELA to cover only certain railroad worker injuries while absolutely precluding any remedy for others." *Id.* at 13a (citing *Reidelbach*, 60 P.3d at 430).

The Montana Supreme Court also held that there was no conflict between FELA and Montana's compelled-settlement regime because "Dannels's FELA action provided him with no opportunity to recover

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[1] BNSF filed a petition for certiorari from the Montana Supreme Court's denial of its second supervisory writ (*see* Case No. 18-1246), but it withdrew that petition in connection with the parties' settlement, which preserved BNSF's ability to seek immediate and direct review through the Montana Supreme Court.

damages for BNSF's alleged intentional bad faith conduct in handling his FELA claim," and that it would be "inconceivable" and "ironic" if an employee "has no remedy for a railroad's claims handling conduct," Pet. App. 14a. The majority reasoned that Montana's laws "fill the space left by FELA" and advance Montana's "overriding interest" in protecting Montana citizens."[2] *Id.* at 15a.

Justice Rice, joined by Justice Baker, dissented. Pet. App. 54a. Adopting the arguments raised earlier by dissenting Justice McKinnon (who recused before oral argument), Justice Rice concluded that FELA preempted Montana's compelled-settlement regime. He explained that Montana law puts FELA defendants in an untenable position of fighting "on dual fronts under dual standards" which forces a railroad "to choose between incompatible options: reserve negligence defenses for trial in the FELA action and invite UTPA claims for failure to settle or advance damage payments" or "settle the FELA action to avoid any UTPA claims" thus "forfeiting any trial defenses." *Id.* at 53a.

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[2] In so holding, the majority reaffirmed *Reidelbach*'s test for FELA preemption, which—instead of applying this Court's FELA precedent—applies a standard derived from a National Labor Relations Act case, *Farmer* v. *United Brotherhood of Carpenters & Joiners of America*, 430 U.S. 290 (1977). *See* Pet. App. 15a (citing *Reidelbach*, 60 P.3d at 429). Under that test, state laws are compatible with FELA as long as the railroad's conduct is not protected by FELA, the state has an "overriding state interest" in the enforcement of the state law, and the state law does not interfere with the "administration" of FELA. *Id.* (internal quotation marks omitted). In *Reidelbach*, the Montana Supreme Court acknowledged that no other court had ever applied NLRA preemption standards to FELA. *See* 60 P.3d at 429.

Justice Sandefur concurred in the judgment. Unlike the majority, he concluded, as a matter of state law, that BNSF is beyond the scope of the UTPA's provisions applicable to self-insured entities, but that BNSF still owes similar duties to its employees under state common law because of the "special relationship" between railroads and railroad workers. Pet. App. 47a. Notably, however, Justice Sandefur joined the dissenting opinion "to the extent that it points out the manifest incompatibility of … insurance-specific UTPA constructs and procedures with the FELA claims handling process." *Id.* at 46a n.16.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court's decision warrants this Court's review because it conflicts with this Court's FELA decisions by enabling state law to impose liability on a railroad for asserting bona fide federal-law defenses under FELA; it radically transforms the relationship between a railroad and its workers; and it dismantles the nationwide uniformity that Congress enacted FELA to promote. Moreover, the Montana Supreme Court's decision conflicts with decisions of the federal courts in Montana, and FELA's venue-selection and removal rules will ensure that this disuniformity will continue by enabling all future FELA claims to be brought in Montana state courts. Review by this Court is necessary to restore uniformity to FELA, to resolve the federal and state court conflict, and to protect the integrity and force of this Court's precedents.

This Court has repeatedly held that FELA occupies the field of railroad employer liability to employees for on-the-job injuries by establishing a "comprehensive" and "exclusive" federal framework governing the "responsibility of interstate carriers by railroad to

their employees injured in such commerce." *N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 151-52 (1917) (internal quotation marks omitted). Because FELA is comprehensive, state law cannot "fill the space left by" FELA by providing a remedy that FELA withholds. Pet. App. 15a. And because FELA is exclusive, a State's "'overriding interest' in protecting [its] citizens" (*id.*) cannot justify a state-law regime "trenching on the province of the Act," *S. Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 371 (1953). As this Court has repeatedly held, FELA's remedial scheme cannot be "extended nor abridged by common or statutory laws of the state." *N.Y. Cent. & Hudson R.R. Co.* v. *Tonsellito*, 244 U.S. 360, 362 (1917).

The Montana Supreme Court stands alone in subjecting FELA defendants to state-tort liability for exercising their federal right to defend themselves in a FELA suit. This Court should grant review to restore the exclusive and uniform federal remedial regime that Congress so plainly sought to establish and which this Court has preserved for more than a century.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S FELA PRECEDENT.

A. In FELA, "Congress took possession of the field of employers' liability to employees in interstate transportation by rail, and all state laws upon that subject were superseded." *Chi., Milwaukee & St. Paul Ry. Co.* v. *Coogan*, 271 U.S. 472, 474 (1926). FELA "is intended to operate uniformly in all the states, as respects interstate commerce, and in that field it is both paramount and exclusive." *Winfield*, 244 U.S. at 172. FELA therefore "displaces any state law trenching on the province of the Act." *S. Buffalo*, 344 U.S. at 371.

This Court has repeatedly applied FELA's uniform framework to hold preempted state laws that imposed state-law duties above and beyond those FELA authorizes. In *Winfield*, for example, the Court held that FELA preempted a state-law strict liability claim for an on-the-job injury that did not result from negligence by the railroad employer. 244 U.S. at 153-54. The Court explained that although FELA does not provide for liability where the railroad "is not chargeable with negligence," FELA does not "leave the states free to require compensation where the act withholds it." *Id.* at 150. Where Congress has regulated in an area within its constitutional powers, the Court reasoned, "it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations." *Id.* at 153.

This Court reaffirmed FELA's broad preemptive scope in *Tonsellito*, where it rejected a father's state-law claim for "expenses incurred for medical attention to his son and loss of the latter's services." 244 U.S. at 361. The Court explained that because FELA did not provide a remedy to the father for such a claim, it also preempted the claim under state law: "Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state." *Id.* at 362.

This Court has similarly held that federal law alone determines the defenses that a defendant may raise in FELA litigation. *Dice* held that federal law preempts state-law challenges to the validity of FELA releases. 342 U.S. at 361. The Court explained that "the federal rights affording relief to injured railroad

employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act." *Id.* Indeed, "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Id.* Those federally guaranteed defenses include the right to trial by jury, which "is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure.'" *Dice*, 342 U.S. at 363; *see also Bailey* v. *Cent. Vt. Ry.*, 319 U.S. 350, 354 (1943) (FELA's jury trial right "is part and parcel" of the remedial framework established by FELA" (internal quotation marks omitted)).

Nor may a state law obstruct the operation of FELA's comprehensive scheme by coercing a FELA defendant into dropping, waiving, or settling its federal-law defenses. In *South Buffalo*, this Court held that a state regime permitting—but not requiring—railroads to forgo a FELA suit and instead to *voluntarily* opt in to proceedings before a worker's compensation board was not preempted. *See* 344 U.S. at 368-69, 371. But "[t]he difference between coercion and permission," the Court explained, was "decisive." *Id.* at 372. Had the State instead coerced the railroad into submitting to a state review board rather than litigating the FELA claims in court, its law would have been preempted as "trenching on the province of the Act." *Id.* at 371-72.

Since FELA's enactment, this Court has repeatedly held that state laws that interfere with FELA's uniform and exclusive scheme are preempted. While in some of these cases States had sought to "gnaw at rights rooted in federal legislation" (*S. Buffalo*, 344

U.S. at 372) by implementing state laws hostile to FELA plaintiffs, this Court also has repeatedly invalidated as preempted state laws that would have provided recovery more generous to plaintiffs than FELA authorizes. *See, e.g.*, *Winfield,* 244 U.S. at 153-54; *Tonsellito*, 244 U.S. at 361; *Seaboard Air Line Ry.* v. *Horton*, 233 U.S. 492, 500-02 (1914). This Court has reaffirmed time and again that Congress intended there to be a national and uniform rule such that "[FELA] liability can neither be extended nor abridged by common or statutory laws of the state." *Tonsellito*, 244 U.S. at 362.

B. The decision below flouts the controlling precedent of this Court and resurrects arguments that this Court has repeatedly and emphatically rejected. This Court has invested considerable institutional resources to secure FELA's uniform operation. *See Winfield*, 244 U.S. at 156 n.4 (Brandeis, J., dissenting) (listing FELA preemption cases decided before 1917); *see also Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 521, 548-58 (1957) (Frankfurter J., dissenting) (listing dozens of FELA cases on the Court's merits docket from 1911–1956 alone). Yet despite Justice McKinnon's caution that "there is ample federal authority, not discussed in *Reidelbach*, which appears to provide FELA is the exclusive remedy for injured railroad workers," Pet. App. 65a, the Montana Supreme Court proceeded as if its decision in *Reidelbach* alone were controlling. Apart from a fleeting mention of *Dice*, Pet. App. 14a, 18a, the Montana Supreme Court did not mention or discuss *any* of this Court's FELA preemption decisions from the last 100 years. Instead, as if writing on a blank slate, the Montana Supreme Court opined that because FELA does not permit Dannels to obtain damages for the alleged emotional distress caused by

"BNSF's claims handling practices," Montana's outlier state-law rule may "fill the space left by the FELA" in order to "protect its citizens." *Id.* at 15a.

That reasoning fundamentally conflicts with FELA's statutory scheme and this Court's precedents. Under FELA, the railroad is not the worker's insurer so is not "handling" insurance "claims" when defending itself in a FELA negligence suit. And FELA leaves no "space" for state law to hold a railway liable for raising bona fide and non-frivolous defenses under FELA itself. Indeed, the most basic, bedrock tenet of this Court's FELA preemption holdings is that States are not "free to require compensation where the act withholds it." *Winfield*, 244 U.S. at 150; *see also, e.g.*, *S. Buffalo*, 344 U.S. at 371-72; *Bailey*, 319 U.S. at 352; *Coogan*, 271 U.S. at 474; *Tonsellito*, 244 U.S. at 361-62. Under *Winfield*, *Tonsellito*, and their progeny, the fact that Dannels could not recover the damages he seeks under FELA means that he *cannot* recover those damages under state law. *See, e.g.*, *Tonsellito*, 244 U.S. at 362 ("Congress having declared when, how far, and to whom carriers shall be liable," FELA "liability can neither be extended nor abridged by common or statutory laws of the state."); *Horton*, 233 U.S. at 501 ("[S]ince Congress, by [FELA], took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded.").

The Montana Supreme Court's ruling also ignores that a state cannot impose liability on a party for raising a bona fide defense under a federal statute: The defendant's right to assert that defense is the "supreme Law of the Land," U.S. Const. art. VI, cl. 2, and this Court has made clear that state tort duties that obstruct the exercise of federal rights are preempted,

see PLIVA, Inc. v. *Mensing*, 564 U.S. 604, 619, 624 (2011). Nor may a state use local law or practice to thwart a federal cause of action. *Cf. Felder* v. *Casey*, 487 U.S. 131, 138 (1988) ("[W]here state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" (quoting *Brown* v. *W. Ry. of Ala.*, 338 U.S. 294, 296 (1949)); *Wilson* v. *Garcia*, 471 U.S. 261, 269 (1985) ("Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action."), *superseded by statute as stated in Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

The Montana Supreme Court's disregard for this Court's precedents is all the more blatant given that *Winfield* rejected the same reasoning more than a century ago. In *Winfield*, the plaintiff contended that, in light of FELA's silence as to liability for injuries not attributable to the railroad's negligence, state law could fill the space. 244 U.S. at 149-50. That is, the plaintiff argued that the defendant should be held liable notwithstanding the availability of a federal-law negligence defense. The Court disagreed, emphasizing that "no State is at liberty thus to interfere with the operation of a law of Congress." *Id.* at 153.

The Montana Supreme Court's decision below also conflicts with this Court's holding in *Dice* that the defenses available to a FELA defendant are a matter of federal law, and that FELA's preemptive force extends not only to state-law claims based on employment-related injuries covered by FELA but also to state rules that interfere with railroads' ability to defend themselves against FELA claims. *See Dice*, 342 U.S. at 361. As this Court explained, "the federal

rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act." *Id.* Yet, under the Montana Supreme Court's view, a FELA defendant that fails to settle promptly (and instead interposes a federal defense) will be subject to state-law liability and possible punitive damages for electing to defend its FELA case at trial. As Justice Rice recognized in dissent, state law therefore forces FELA defendants "to choose between two incompatible options" of defending FELA claims and risking new state-law liability for not settling, or settling their FELA claims to avoid that follow-on litigation about supposedly "bad faith" conduct of defending oneself. Pet. App. 53a-54a. Upholding state-law duties that coerce FELA defendants to surrender their federal defenses is a repudiation of *Dice*.

The Montana Supreme Court reasoned that it may impose state-law burdens on FELA defendants because FELA focuses on the underlying conduct giving rise to the workplace injury, while the state-law duties focus on "the process used … before entering settlement." Pet. App. 12a. But that is beside the point: Regardless of whether Montana treats BNSF's conduct in FELA litigation as distinct from conduct that allegedly contributed to Dannels's on-the-job injury, state law can never enlarge the scope of Dannels's FELA rights or abridge a railroad's FELA defenses. *See Tonsellito*, 244 U.S. at 361-62. Yet that is exactly what the Montana Supreme Court has endorsed here, by imposing state-law liability on a railroad that asserts its federal defenses. Moreover, the state-law duty to settle here is inextricably intertwined with the conduct addressed by FELA—the

state-law duty to settle would not exist but for the existence of an injury that is already the basis of a FELA suit. The duty under Montana law here is thus no different from the state-law duties this Court held preempted in *Tonsellito*, where the harm sought to be remedied was analytically distinct from the underlying on-the-job injury, but the claim was still preempted by FELA because the harm ultimately arose out of that same underlying injury. *See* 244 U.S. at 361-62.

The Montana Supreme Court thought it significant that Dannels did not seek a declaratory judgment or demand "advance payment of either his wage loss or medical bills *until after* the jury had rendered a verdict in his FELA claim." Pet. App. 18a (emphasis in original). But the key point is that no money judgment had been entered and BNSF still had bona fide defenses to liability, which it raised in post-trial motions (without any claim that the arguments were frivolous). The effect of Montana's state-law scheme is thus to coerce the defendant into dropping its federal-law defenses, because it faces added state-law liability if it does not.[3]

Dannels's complaint is abundantly clear that it seeks to impose liability on BNSF for failing to advance his lost wages and medical expenses as soon as the prospect of liability became "reasonably clear," without regard to whether BNSF still had defenses

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[3] Indeed, the very purpose of the Montana scheme is to cause insurers to "expeditiously settle claims" for coverage. *Klaudt* v. *Flink*, 658 P.2d 1065, 1068 (Mont. 1983) (Morrison, J., concurring in part and dissenting in part), *superseded in part by* Mont. Code Ann. § 33–18–242. But FELA's negligence-based framework does not involve insurance coverage or claims in the first place.

available. Pet. App. 131a-136a. And more fundamentally, state law cannot punish a FELA defendant for failing to advance lost wages or expenses *regardless* of when the employee demands advancement, because Congress adopted the "principle that compensation should be exacted from the carrier where, *and only where*, the injury results from negligence imputable to it." *Winfield*, 244 U.S. at 150 (emphasis added). The Montana Supreme Court's attempt to create an exception for FELA preemption based on the timing of a plaintiff's demand for advancement of wages finds no support in any FELA case ever decided by this Court.

II. FEDERAL AND STATE COURTS IN MONTANA ARE SPLIT ON THE QUESTION PRESENTED.

The Montana Supreme Court's holding entrenches a two-decade split between the federal and state courts of Montana on an important issue of federal statutory interpretation. This Court has repeatedly granted certiorari in situations where state and federal courts have reached divergent interpretations of federal laws that require uniform application. *See, e.g.*, *BNSF Ry. Co.* v. *Loos*, 139 S. Ct. 893, 897 (2019) (resolving split between federal and state courts regarding whether FELA damages for lost wages qualify as taxable compensation under the Railroad Retirement Tax Act); *Turner* v. *Rogers*, 564 U.S. 431, 438-39 (2011); *Johnson* v. *California*, 545 U.S. 162, 164 (2005); *Florida* v. *White*, 526 U.S. 559, 563 (1999); *cf.* Sup. Ct. R. 10(b) (petition for certiorari may be granted where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of … a United States court of appeals"). Indeed, uniformity is precisely why this Court was given authority to review a state supreme court's

interpretation of federal law. *See Martin* v. *Hunter's Lessee*, 14 U.S. 304, 347-48 (1816); The Federalist No. 80 (McLean's ed.) (Alexander Hamilton) (citing as justification for federal judiciary the "necessity of uniformity in the interpretation of the national laws" and a need to avoid the "hydra" of "[t]hirteen independent courts of final jurisdiction over the same causes").

Federal and state courts in Montana are squarely divided on the question presented. The federal courts in Montana have long held that Montana cannot impose additional liability upon a FELA defendant for raising non-frivolous FELA defenses. In *Toscano* v. *Burlington Northern Railroad Co.*, 678 F. Supp. 1477 (D. Mont. 1987), the district court held that Montana's unfair settlement claims are preempted against FELA defendants because "FELA presents the exclusive remedy in all actions falling within the ambit of the Act." *Id.* at 1479. FELA therefore precludes plaintiffs from using state unfair settlement claims law to "impos[e] liability upon the [defendant] for actions relating to an FELA claim, when the liability is predicated upon a duty having its genesis in state law." *Id.*; *see also Giard* v. *Burlington N. Santa Fe Ry. Co.*, No. 12-CV-113, 2014 WL 37687, at *9-10 (D. Mont. Jan. 6, 2014) (holding preempted a state-law "negligent management" claim and expressly disagreeing with *Reidelbach* because "the application of the FELA is a matter of federal law"), *adopted by* 2014 WL 296862 (D. Mont. Jan. 27, 2014). The Montana Supreme Court in *Reidelbach* expressly considered and rejected *Toscano* in favor of its own novel construction of FELA. 60 P.3d at 426-29.

The Ninth Circuit has similarly held that FELA preempts the state-law claims Dannels asserts here.

Dannels seeks punitive damages, yet the Ninth Circuit has squarely held that punitive damages are not available under FELA. *See Wildman* v. *Burlington N. R.R. Co.*, 825 F.2d 1392, 1394 (9th Cir. 1987). The Ninth Circuit also has held that federal law preempts state-law claims alleging that FELA defendants engaged in misconduct including fraud during the FELA settlement process. In *Counts* v. *Burlington Northern Railroad Co.*, 896 F.2d 424 (9th Cir. 1990), the Court held that FELA preempted a railroad employee's state-law action seeking to invalidate the release of his FELA claim based on a fraud-in-the-inducement theory. *Id.* at 425-26. It made clear that "[t]o permit independent state-law actions for fraud in inducing FELA releases would lead to results that would vary from state to state," and that FELA preempted the plaintiff's state-law claim "regardless of whether federal law provides the remedy he seeks." *Id.* at 426.

Montana's "unfair" settlement causes of action—which impose state-law duties on "the process used … before entering settlement," Pet. App. 12a—squarely conflict with *Counts*, which holds that federal law exclusively governs "the process" of entering into FELA settlements. The Ninth Circuit has further held (albeit in an unpublished decision) that FELA preempts state-law claims for intentional infliction of emotional distress, *see Stiffarm* v. *Burlington N. R.R. Co.*, 81 F.3d 170 (Table), 1996 WL 146687 (9th Cir. 1996) (per curiam)—which are the precise claims Dannels asserts here. In reaching this conclusion, the Ninth Circuit "reject[ed]" the plaintiff's argument "that it is a 'Catch-22' to deny him access to a state-law remedy if the FELA affords no recovery," noting "[t]hat the FELA occupies the entire field of railroad employee injuries does not mean that every railroader's injury is compensable." *Id.* at *2 n.3.

The division between state and federal authority in Montana is untenable: It means that the success or failure of a plaintiff's claim against a FELA defendant under Montana law depends on whether the claim is brought in state or federal court. And the prohibition on removal of FELA actions from state court to federal court means that a FELA defendant sued in Montana state court must litigate in state court. *See* 28 U.S.C. § 1445(a) (prohibiting removal of any civil action based on 45 U.S.C. §§ 51-60); *Burnett* v. *N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434 (1965) ("Congress, in … prohibiting removal of FELA cases to federal courts, has sought to protect the plaintiff's right to bring an FELA action in a state court.").

Given the Montana Supreme Court's entrenched position in both *Reidelbach* and the decision below—and the long-standing and opposite rules that apply in the Ninth Circuit and the district of Montana—every FELA plaintiff will file a so-called "bad faith" claim in the state court venue, where it can obtain money damages—including for emotional distress and punitive damages—that would be squarely foreclosed in the federal forum. This Court's review is essential to stop the ongoing and predictable forum shopping created by these divergent approaches to what should be a uniform federal standard for FELA cases.

III. The Question Presented Is Exceptionally Important To FELA Defendants And To The Preservation Of FELA's Uniform Federal Framework.

The question presented is exceptionally important and no mere exercise in error correction. The Montana Supreme Court's ruling directly implicates the right of railroads in Montana to defend themselves against FELA claims, and it undermines the integrity

of the nationally uniform legal framework Congress established when it enacted FELA.

Montana is an outlier in defying this Court's FELA precedent by treating railroads as the insurer of their workers and imposing a duty on railroads to settle and pay FELA claims as soon as liability becomes merely reasonably clear (even if the railroad's federal defenses ultimately may prevail). Montana is the only State that currently permits such "third-party claimant" actions against self-insured defendants under its unfair trade practices code. *See* Greg Munro, *Continuing Development of Insurance Bad Faith in Montana*, Tr. Trends 25, 25-26 (2007), https://scholarship.law.umt.edu/faculty_barjournals/13/; *see also* Mont. Code Ann. § 33-18-242(8). And the Montana state courts are the only jurisdiction in which plaintiffs can use statutory and common law claims to extract damages from FELA defendants that FELA does not authorize. Accordingly, the question presented is unlikely to arise in a traditional circuit split—not because there is no difference of opinion—but because Montana has imposed singular and extraordinary burdens on FELA defendants that no other state has even attempted to impose. Moreover, plaintiffs can unilaterally avoid all of the preemption rules in federal court (and prevent any possible further percolation) simply by filing in state court to obtain Montana's plaintiff-friendly rule. FELA does not permit removal to federal court. *See* 28 U.S.C. § 1445(a).

The Montana decision destroys the nationwide uniformity Congress sought to obtain when it enacted FELA. As Justice Rice recognized, only in Montana is a railroad forced to fight on "dual fronts" and "to

choose between two incompatible options" of complying with the UTPA and common law regime, or defending the FELA case on the merits. Pet. App. 53a. And only in Montana can plaintiffs like Dannels obtain recovery for both their workplace injuries *and* for the "emotional distress" of having to litigate the FELA claim to judgment in the first place.

The prejudice to railroads from Montana's outlier state-law duty also extends beyond monetary liability, as this case illustrates. BNSF sustained a default judgment on liability and causation because the trial court found it did not produce privileged or otherwise protected documents that would not be discoverable in ordinary FELA litigation—including documents about settlement strategy, reserves, and litigation assessments of FELA cases across the country. Pet. App. 78a. Justice McKinnon pointed out this disturbing anomaly, noting that the documents to be produced "are otherwise undiscoverable, *but for the case's status as a UTPA action*." *Id.* at 66a. Through its "unfair" settlement causes of action, Montana authorizes discovery and a state-law inspection and evaluation of how a railroad litigates and resolves FELA claims across the country. Indeed, Dannels's claim for punitive damages is based on BNSF's alleged "practices" of "unfairly" refusing to settle other FELA claims. *Id.* at 136a-139a. These state-law claims are thus extraordinarily intrusive and put in dispute otherwise privileged documents as well as conduct in other states. Montana's regime attacks and erodes the primacy and uniformity of federal law. *See S. Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 372 (1953).

Montana law affects not only the damages a plaintiff may obtain, but from whom the plaintiff may obtain them—it is only through Montana's state-law claims that Dannels could assert a cause of action against his co-employee, Nancy Ahern, the individual claims investigator at BNSF. *See O'Fallon* v. *Farmers Ins. Exch.*, 859 P. 2d 1008, 1015 (Mont. 1993) ("[I]ndividuals, as well as insurers, are prohibited from engaging in … unfair trade practices…"). Montana's regime thwarts this Court's century-old holding that "Congress having declared when, how far, and *to whom* carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state." *N.Y. Cent. & Hudson R.R. Co.* v. *Tonsellito*, 244 U.S. 360, 362 (1917) (emphasis added). It sweeps in and subjects to liability individual employees who would not be proper defendants in a FELA suit. *See Lockard* v. *Mo. Pac. R.R. Co.*, 894 F.2d 299, 302 n.8 (8th Cir. 1990) ("Although the FELA does make railroads liable for the negligence of their officers, agents, and employees, the statute nevertheless imposes liability only on railroads—not on *railroads and their agents*." (emphasis in original) (citation omitted)).

The Montana Supreme Court's decision also introduces destabilizing forces in the railroad industry. Railroads are inherently interstate operations, and the employees of railroads routinely travel and work across state lines to repair track, perform maintenance, and keep the rails running. For example, Dannels sued for cumulative trauma over his 30-year career, which he spent working in Washington, North Dakota, and Montana. Ex. C to BNSF's Partial Mot. for Summ. J. (Occupational History of R. Dannels). The need for predictable and uniform standards of federal liability is essential in these circumstances.

But that uniformity and predictability is dismantled under Montana's regime, with the legal rules governing worker claims completely dependent on geography and forum. BNSF's legal duties to "promptly settle" and "advance lost wages" kick in if Dannels sues in Montana but not in North Dakota or Washington.

These Montana-specific FELA standards are compounded by the other plaintiff-friendly rules that Montana also affords to FELA plaintiffs. For example, the Montana Supreme Court has explicitly disagreed with the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits and extended the statute of limitations for FELA claims longer than any other court. *See Anderson* v. *BNSF Ry. Co.*, 354 P.3d 1248, 1259-61 (Mont. 2015), *cert. denied*, 577 U.S. 1235 (2016). And given the increasing frequency of cumulative trauma claims of the sort alleged by Dannels here, where any aggravating conduct provides a basis for personal jurisdiction and extends the statute of limitations, Montana is the forum of choice for FELA plaintiffs and for follow-on litigation seeking non-economic and punitive damages for "unfair" settlement practices.

This Court has repeatedly granted review to safeguard the congressional objectives that animate FELA in the face of encroachments by state courts and legislatures. And this Court has repeatedly intervened where the Montana Supreme Court disregarded this Court's precedents. *See, e.g.*, *Am. Tradition P'ship, Inc.* v. *Bullock*, 567 U.S. 516, 516 (2012) (per curiam) (summarily reversing in light of *Citizens United*); *Tyrrell* v. *BNSF Ry. Co.*, 373 P.3d 1, 9 (Mont. 2016) (McKinnon, J., dissenting) (faulting majority for "[d]isregarding the United States Supreme Court's express holdings in *Goodyear* and in *Daimler*" in holding

that FELA authorizes general personal jurisdiction), *rev'd*, 137 S. Ct. 1549 (2017); *PPL Mont., LLC* v. *Montana*, 229 P.3d 421, 465 (Mont. 2010) (Rice, J., dissenting) (characterizing the majority's approach as "an illogical rendering which ignores both the Supreme Court's approach and the actual result of" Supreme Court precedent), *rev'd*, 565 U.S. 576 (2012). Nor is this the first time the Montana Supreme Court has impermissibly held that its "overriding interest in protecting its citizens" (Pet. App. 15a) justifies the imposition of state-law duties that go further than federal law permits. *See Atl. Richfield Co.* v. *Mont. Second Judicial Dist. Ct.*, 408 P.3d 515, 526 (Mont. 2017) (McKinnon, J., dissenting) (criticizing majority opinion as "inconsistent with CERCLA and federal precedent"), *vacated in part sub nom. Atl. Richfield Co.* v. *Christian*, 140 S. Ct. 1335 (2020).

This Court for more than a century has protected FELA from any incursions by states—both favorable and unfavorable to railroad workers—that would disrupt the uniformity of the FELA scheme. In doing so, this Court has repeatedly and emphatically held that states may not impose liability or damages beyond that provided by FELA. This Court should grant review to once again restore the supremacy of federal law in this field in which Congress preserved no role for the States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 20, 2021

APPENDIX

APPENDIX A

2021 MT 71

SUPREME COURT OF MONTANA

DA 19-0343

Robert DANNELS, Plaintiff and Appellee,

v.

BNSF RAILWAY COMPANY Defendant and Appellant.

Argued and Submitted: June 10, 2020

Decided: March 23, 2021

APPEAL FROM: District Court of the Eighth Judicial District, In and For the County of Cascade, Cause No. BDV-14-001, Honorable Katherine M. Bidegaray, Presiding Judge

For Appellant: Andrew S. Tulumello (argued), Gibson, Dunn & Crutcher LLP, Washington, District of Columbia Jeff Hedger, Michelle T. Friend, Hedger Friend, P.L.L.C., Billings, Montana

For Appellee: Deepak Gupta (argued), Lark Turner, Gupta Wessler PLLC, Washington, District of Columbia Dennis P. Conner, Keith D. Marr, Conner & Marr, PLLP, Great Falls, Montana

For Amicus Association of American Railroads: Anthony M. Nicastro, Knight Nicastro MacKay, LLC, Billings, Montana

For Amicus Washington Legal Foundation: Mark D. Parker, Samantha A. Howard, Parker, Heitz & Cosgrove, PLLC, Billings, Montana

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Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Defendant and Appellant BNSF Railway Company (BNSF) appeals the orders of the Eighth Judicial District Court, Cascade County, denying BNSF summary judgment and entering final judgment in favor of Plaintiff and Appellee Robert Dannels. We address the following issue:

> *Does the Federal Employers' Liability Act preempt an injured railroad employee's State law bad faith claims?*

¶2 We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Dannels was employed by BNSF as a Maintenance of Way laborer and equipment operator in northern Montana from approximately 1990 to 2010. On March 17, 2010, Dannels was assigned to operate a Bobcat skidsteer to remove snow piles from a parking lot in BNSF's Havre railroad yard. The front-end of the skidsteer collided with a steel wellhead

concealed under a snow pile. As a result of the collision, Dannels suffered a disabling back and spine injury which required medical care.

¶4 On December 6, 2010, Dannels sued BNSF under the Federal Employers' Liability Act (FELA) to recover damages for his work-related injury. Dannels alleged that throughout his employment, BNSF negligently assigned him physical work activities that caused "cumulative trauma" to his lower back and spine and made him susceptible to permanent disability.

¶5 Before trial, BNSF moved in limine to preclude Dannels from referencing any "emotional distress not directly tied to [Dannels'] physical injury." The motion was granted and the District Court instructed the jury that it could only award damages "caused by the event in question," specifically "injuries . . . sustained as a consequence of physical impact."

¶6 On February 13, 2013, a jury returned a verdict in Dannels' favor in the amount of $1.7 million. The jury found BNSF to be 100% at fault and Dannels to be 0% at fault.

¶7 During the pendency of Dannels' FELA claim, he never sought advance payment from BNSF of either his medical expenses or his lost wages, nor did he file a declaratory judgment action seeking a declaration of BNSF's obligations in that regard. After the verdict, but before the final judgment was entered, Dannels submitted a written request to BNSF, seeking payment of the portion of the jury verdict that represented his past lost wages. BNSF refused. After BNSF's motion for a new trial was denied, it paid the $1.7 million judgment.

¶8 On January 2, 2014, Dannels filed claims for bad faith and punitive damages against BNSF. He

asserted BNSF violated Montana common law and statutory duties of good faith and fair dealing in handling his FELA claim by failing to advance his lost wages, failing to reasonably investigate and adjust his claim, and failing to offer him alternative or permanent employment. Dannels had originally named the individual claims adjustor and BNSF Insurance Company, Ltd. (BNSF IC) as defendants in his bad faith complaint. Dannels' subsequently voluntarily dismissed the claims adjustor. On May 13, 2015, BNSF IC filed a motion to dismiss for lack of personal jurisdiction. BNSF IC acknowledged that it is a wholly owned subsidiary of the same parent company as BNSF, and that it maintains a program of self-insurance in conjunction with BNSF for coverage of FELA claims made by BNSF employees. BNSF IC asserted it has no contacts with the State of Montana because it is a licensed insurance company organized under the laws of Bermuda, a territory of the United Kingdom. The District Court granted BNSF IC's motion.

¶9 On May 1, 2017, BNSF moved for summary judgment, asserting that Dannels' State law bad faith claims were preempted by the FELA. The District Court denied BNSF's motion.

¶10 On February 2, 2018, BNSF filed motions in limine seeking to preclude Dannels from offering evidence or testimony at trial regarding BNSF claims-handling practices or reporting, including evidence or testimony that BNSF had a duty to advance pay Dannels' FELA claim or offer him alternative employment or permanent employment. BNSF argued in its motion that the FELA was the law governing Dannels' underlying claim and does not require railroads to advance pay claimants or offer alternative employment or permanent employment as part of its settlement

practices. BNSF further argued that "[e]vidence of other claims or claims handling practices or reporting in other cases is not relevant to the case at bar. [Dannels'] underlying claim and BNSF's claim handling practice is the only relevant issue."

¶11 Before the District Court could rule on BNSF's motions in limine, the parties filed a stipulation for entry of final judgment. BNSF stipulated that judgment be entered against it on Dannels' bad faith claims in the amount of $7.4 million, inclusive of all fees, interest, and costs. BNSF reserved its right to appeal the District Court's denial of its summary judgment motion but stipulated that it would pay Dannels $2.25 million "regardless of the outcome of any appeal." BNSF stipulated that it would pay the $5.15 million balance upon its exhaustion of its appeal rights to this Court and the United States Supreme Court, if its appeals were unsuccessful. On May 14, 2019, the District Court accepted the parties' stipulation and entered final judgment against BNSF.

STANDARDS OF REVIEW

[1–3] ¶12 We review a district court's summary judgment ruling de novo, applying the criteria set forth in M. R. Civ. P. 56. *Sinclair v. Burlington Northern & Santa* Fe *Ry.*, 2008 MT 424, 4 26, 347 Mont. 395, 200 P.3d 46. Summary judgment is appropriate if the moving party demonstrates from "the pleadings, the discovery and disclosure materials on file, and any affidavits" that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Sinclair*, 4 26; M. R. Civ. P. 56(c)(3). Where a district court determines there is no material factual dispute and the moving party is entitled to judgment as a matter of law, we

review whether the district court correctly applied the law. *Mont. Immigrant Justice Alliance v. Bullock*, 2016 MT 104, 4 28, 383 Mont. 318, 371 P.3d 430; *Sinclair*, 4 26. A district court's determination regarding federal preemption is a question of law which we review for correctness. *Mont. Immigrant Justice Alliance*, 4 14.

DISCUSSION

¶13 *Does the Federal Employers' Liability Act preempt an injured* employee's *State law bad faith claims?*

[4, 5] ¶14 The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; 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.

U.S. Const. art. VI, cl. 2. The Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cty. v. Auto. Med. Laboratories, Inc.*, 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.). Congress is empowered by the Supremacy Clause to pass federal acts that supersede state law in three ways: (1) express preemption, (2) field preemption, or (3) conflict preemption, "the latter two being forms of implied preemption." *Mont. Immigrant Justice Alliance*, 4 28 (citing *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022-23 (9th Cir. 2013)).

¶15 BNSF argues that Dannels' state law bad faith claims are preempted by the FELA. The FELA is a federal act that serves as the "comprehensive" and "exclusive" scheme of recovery for physical injuries suffered on-the-job by a railroad employee, any part of whose duties further interstate commerce, as a result of the negligence of an employer. *See* 45 U.S.C. § 51 ("Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier. . . 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 . . . ."); *New York C. R. Co. v. Winfield*, 244 U.S. 147, 151-52, 37 S. Ct. 546, 548, 61 L. Ed. 1045, 1048-49 (1917). The FELA was originally enacted to address "the rising toll of serious injuries and death among workers in the railroad industry." *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, 4 19, 312 Mont. 498, 60 P.3d 418 (quoting *Harris-Scaggs v. Soo Line R. Co.*, 2 F. Supp. 2d 1179 (E.D. Wis. 1998)). *See also Anderson v. BNSF Ry.*, 2015 MT 240, 4 35, 380 Mont. 319, 354 P.3d 1248 (quoting *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 398, 2 L. Ed. 2d 382 (1958)) ("'[I]t is clear that the general congressional intent was to provide liberal recovery for injured workers.'"). When the FELA was enacted in 1908, railroading was "a major industry in the United States and as such employed great numbers of people." *Reidelbach*, 4 19. Railroad employees "were exposed to many dangers and risks associated with railroading but had little protection or recourse from work-related injury or death and were frequently denied redress for their injuries by antiquated common-law rules favoring employers." *Reidelbach*, 4 19 (citing *Rogers v. Consolidated Rail Corp.*, 948 F.2d

858 (2d Cir. 1991)). The FELA provided compensatory relief for injured railroad employees by "modif[ying] or eliminat[ing] the common-law defenses that had previously precluded railroad employees from recovering from their employers for injuries sustained during the course of employment." *Reidelbach*, 4 19 (citing *Rogers*, 948 F.2d at 861).

[6] ¶16 The Montana Unfair Trade Practices Act (UTPA) allows a person to seek damages from an insurer engaging in unfair and deceptive practices. Section 33-18-101, MCA. UTPA applies to "every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance," § 33-1-201(6), MCA, including "a person, firm, or corporation utilizing self-insurance to pay claims made against them,"§ 33-18-242(8), MCA. *But see Shattuck v. Kalispell Reg'l Med. Ctr.*, 2011 MT 229, 4 15, 362 Mont. 100, 261 P.3d 1021 (citing *Ogden v. Mont. Power Co.*, 229 Mont. 387, 392, 747 P.2d 201, 204 (1987)) (Exempting some self-insured entities from the UTPA because they are not "primarily in the business of . . . enter[ing] into insurance contracts."). As we have previously recognized in the context of workers' compensation insurance, an injured employee is considered a third-party claimant even when the employer is self-insured. *Suzor v. Int'l Paper Co.*, 2016 MT 344, 4 22, 386 Mont. 54, 386 P.3d 584 ("[A]n injured employee's position as a third-party claimant does not materially change in the context of self-insurance."). The UTPA authorizes a third-party claimant to pursue bad faith claims against the insurer. Section 33-18-242(6)(b), MCA.

¶17 Section 33-18-242(1), MCA, of the UTPA authorizes an insured or a third-party claimant to pursue "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[, MCA]." These subsections prohibit an insurer from engaging in the following unfair claim settlement practices:

> (1) misrepresent[ing] pertinent facts or insurance policy provisions relating to coverages at issue;
>
> . . .
>
> (4) refus[ing] to pay claims without conducting a reasonable investigation based upon all available information;
>
> (5) fail[ing] to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
>
> (6) neglect[ing] to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
>
> . . .
>
> (9) attempt[ing] to settle claims on the basis of an application that was altered without notice to or knowledge or consent of the insured;
>
> . . .
>
> (13) fail[ing] 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 . . . .

Section 33-18-201(1), (4)-(6), (9), (13), MCA.

[7, 8] ¶18 An insurer may also be held liable at common law for bad faith conduct once the underlying claim is resolved. *See Brewington v. Employers Fire Ins. Co.*, 1999 MT 312, 4 19, 297 Mont. 243, 992 P.2d 237; *O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 244-45, 859 P.2d 1008, 1015 (1993). An insurer may be held liable for punitive damages if the insurer acted with actual fraud or actual malice in its handling of a claim. *See* §§ 27-1-220 and -221, MCA; *Lorang v. Fortis Ins. Co.*, 2008 MT 252, 44 90-93, 345 Mont. 12, 192 P.3d 186.

[9, 10] ¶19 Dannels has alleged BNSF improperly investigated, adjusted, and defended against his underlying FELA action, thereby violating the common law and statutory duties imposed under Montana's bad faith laws. In determining whether the FELA preempts Dannels' State bad faith claims, we begin with the long-held presumption that "Congress does not cavalierly [preempt] state-law causes of action. In all [preemption] cases, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Reidelbach*, 4 21 (quoting *Favel v. Am. Renovation & Constr. Co.*, 2002 MT 266, 4 39, 312 Mont. 285, 59 P.3d 412).

[11, 12] ¶20 We begin our inquiry by examining express preemption. "Express preemption occurs when Congress enacts a statute that contains an express preemption provision," *Mont. Immigrant Justice Alliance*, 4 29, thereby "making it clear that state law will not apply in the area governed by federal statute." *Favel*, 4 40. *See also Hillsborough Cty.*, 471 U.S. at 713, 105 S. Ct. at 2375, 85 L. Ed. 2d at 721. There is no express provision in the FELA manifesting a congressional intent to preempt state laws such as the UTPA. We

therefore "will not categorically presume that Congress intends the FELA statute to preempt state law." *Reidelbach*, 4 23. We are thus left with an inquiry into implied preemption, beginning with field preemption.

[13, 14] ¶21 "Field preemption occurs when 'the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.'" *Mont. Immigrant Justice Alliance*, 4 29 (quoting *Arizona v. United States*, 567 U.S. 387, 399, 132 S. Ct. 2492, 2501, 183 L. Ed. 2d 351, 369 (2012)). Congress' intent to occupy the field of a particular area of law becomes "evident where there is a 'framework of regulation so pervasive . . . that Congress left no room for the States to supplement it or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Mont. Immigrant Justice Alliance*, 4 29 (*Arizona*, 132 S. Ct. at 2501, 183 L. Ed. 2d at 369). *See also Favel*, 4 40 ("[C]ongressional intent to preempt state law in a particular area may be implied where the regulation of the area is so comprehensive that it is reasonable to conclude that Congress intended to 'occupy the field' and to leave no room for supplementary state regulation.").

[15, 16] ¶22 As we recognized in *Reidelbach*, "[u]nlike most other federal statutory schemes, the FELA has *no* underlying administrative regulations. Therefore, we cannot imply preemption through administrative regulation." *Reidelbach*, 4 25 (emphasis in original). We must then determine if "[c]ongressional intent to preempt based on the 'structure and purpose'" of the FELA exists. *Reidelbach*, 4 26. As we observed in *Reidelbach*, "the plain language of the FELA reveals that Congress' purpose was to enact a

compensatory scheme" under which railway employees who suffered occupational injuries caused by the negligence of their employer "and in pursuit of interstate commerce" could obtain redress. *Reidelbach*, 4 26. We determined in *Reidelbach* that "[t]his Congressional purpose simply does not contemplate, much less imply, that Congress intended to regulate through the FELA the entire field of injuries and claims a railroad employee may have." *Reidelbach*, 4 26 (citing *Pikop v. Burlington Northern Ry. Co.*, 390 N.W. 2d 743 (Minn. 1986), *cert. denied*, 480 U.S. 951, 107 S. Ct. 1616, 94 L. Ed. 2d 800 (1987)).

¶23 We reaffirm our conclusion in *Reidelbach* that the FELA does not occupy the entirety of the field of recovery for injured railroad employees so as to preempt State bad faith law claims premised on a self-insured railroad's claims-handling conduct. As we have previously determined, an insurer's claims handling and settlement practices constitute intentional conduct that is separate and distinct from the negligent cause of the occupational injuries at issue in the underlying FELA claim. *See Reidelbach*, ¶ 44 ("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 . . . ."). *See also Graf v. Cont'l W. Ins. Co.*, 2004 MT 105, 4 12, 321 Mont. 65, 89 P.3d 22 ("The issues in a UTPA claim are separate from the issues in the underlying claim."). The focus of a UTPA action is not the amount of the settlement paid to the plaintiffs by the insurer. *Peterson v. Doctors' Co.*, 2007 MT 264, 44 39, 43, 339 Mont. 354, 170 P.3d 459. Instead, we focus on "the process used by [the insurer] before entering settlement." *Peterson*, 4 39. As we stated in *Peterson*,

> 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, 44 39, 43.

[17] ¶24 The hallmark of the FELA is that it "does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur." *Anderson*, 4 67 (quoting *Conrail v. Gottshall*, 512 U.S. 532, 543, 114 S. Ct. 2396, 2404, 129 L. Ed. 2d 427, 440 (1994)). The FELA extends only to a railroad's negligent conduct resulting in occupational injuries. Nothing in the FELA's century-plus history evinces an intent that it would apply to a railroad's intentional bad faith conduct in handling the claim stemming from the injury. As we observed in *Reidelbach*, "[G]iven the humanitarian purpose of the FELA, we find it inconceivable, as have several courts before us, that Congress intended the FELA to cover only certain railroad worker injuries while absolutely precluding any remedy for others." *Reidelbach*, 4 53 (citing *Mack v. Metro-North Commuter R.R.*, 878 F. Supp. 673, 677 (S.D.N.Y. 1995); *Rogers v. Consolidated RailCorp.*, 688 F. Supp. 835, 839 (N.D.N.Y. 1988); *Wabash R.R. v. Hayes*, 234 U.S. 86, 34 S. Ct. 729, 58 L. Ed. 1226 (1914)).

¶25 We most recently distinguished a railroad's claims-handling conduct from the negligent conduct

at issue in a FELA action in *Sinclair*. There, an injured railroad employee brought an independent State law fraud claim challenging the validity of the release and settlement he entered with BNSF in the underlying FELA suit. *Sinclair*, 4 5. The release provided that the employee would "release and forever discharge" BNSF "from all claims and liabilities of every kind of nature, including claims for injuries, illnesses or damages, if any, which are unknown to me at the present time . . . ." *Sinclair*, 4 3. The District Court dismissed the employee's claims upon concluding that the FELA governed and did not permit him to "simultaneously affirm the validity of his release and independently pursue state law claims related to fraud." *Sinclair*, 4 28. We affirmed, holding that the employee's FELA release was "inextricably linked" to his claims and, unlike the bad faith claims at issue in *Reidelbach*, the FELA provided a direct remedy to challenge the validity of a fraudulent release. *Sinclair*, 44 33, 35 (citing *Reidelbach*, 44 43- 44; *Counts v. Burlington N. R. Co.*, 896 F.2d 424, 425-26 (9th Cir. 1990)). *See also Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 361, 72 S. Ct. 312, 314, 96 L.Ed. 398, 403 (1952) ("[V]alidity of releases under [the FELA] raises a federal question to be determined by federal rather than state law.").

¶26 Conversely, Dannels' FELA action provided him with no opportunity to recover damages for BNSF's alleged intentional bad faith conduct in handling his FELA claim. The only other available avenue of recovery for this type of conduct was through a separate State law bad faith action. BNSF's argument that the FELA preempts state bad faith claims would make the "inconceivable" void we cautioned against in *Reidelbach* a reality, in which a railroader has no

remedy for a railroad's intentional claims-handling conduct, no matter how egregious. *See Reidelbach*, ¶ 53.

¶27 The infirmity of BNSF's preemption argument is laid bare by its motion in limine in the FELA action, in which it sought to preclude Dannels from referencing any "emotional distress not *directly tied to [his] physical injury*." (Emphasis added.) The very basis of BNSF's motion was that the FELA was limited in scope to physical injuries. This was granted by the District Court and the jury was instructed that it was limited to awarding damages for "injuries . . . sustained as a consequence of *physical impact*." (Emphasis added.) Having foreclosed any scrutiny of its claims handling in the FELA case, BNSF now incongruously argues that its claims handling should escape scrutiny in a bad faith action because it is preempted by the FELA.

¶28 Without being able to present evidence of BNSF's claims handling conduct to the jury, Dannels was likewise foreclosed from seeking damages for BNSF's alleged intentional bad faith conduct. Montana's bad faith laws fill the space left by the FELA and advance our "overriding interest" in protecting Montana citizens from an insurer's bad faith claims practices and, as we discuss more fully below, "there is virtually no risk that the state cause of action would interfere with the effective administration" of the FELA. *Reidelbach*, 44 45-51 (citing *Farmer v. Carpenters*, 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977)) (We must consult in a FELA preemption analysis the additional considerations of whether (1) "the underlying act or conduct is protected or permitted by the FELA; (2) the State has "an overriding interest in protecting its citizens from fraudulent, malicious and bad faith claims practices and the infliction of

intentional emotional injury"; and (3) there is a "risk that the state cause of action would interfere with effective administration of FELA."). The FELA does not foreclose Dannels' claims by field preemption.

[18, 19] ¶29 Finally, we examine conflict preemption. "Conflict preemption occurs when a state law conflicts with a federal law . . . ." *Mont. Immigrant Justice Alliance*, ¶ 29 (citing *Arizona*, 132 S. Ct. at 2501). "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility' . . . or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . .'" *Hillsborough Cty.*, 471 U.S. at 713, 105 S. Ct. at 2375, 85 L. Ed. 2d at 721 (citations omitted).

[20] ¶30 BNSF argues conflict preemption is present between the UTPA and the FELA because the UTPA imposes an obligation on a self-insured employer to pay a plaintiff's lost wages and medical expenses in advance of a final settlement or judgment of the underlying FELA claim when liability becomes reasonably clear. *See Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997); *Dubray v. Farmers Ins. Exch.*, 2001 MT 251, 307 Mont. 134, 36 P.3d 897. In *Ridley*, we held that § 33-18-201(6) and (13), MCA, of UTPA "by their terms[ ] impose" an advance payment obligation on the insurer for an injured party's medical expenses not reasonably in dispute. *Ridley*, 286 Mont. at 334, 951 P.2d at 992. *See also Dubray*, ¶ 14 ("The essence of our holding in *Ridley* is that where liability is reasonably clear, injured victims are entitled to payment of those damages which are not reasonably in dispute without first executing a settlement agreement and final release."). We reasoned

that prompt payment of an injured party's medical expenses was necessary:

> Medical expenses from even minor injuries can be devastating to a family of average income. The inability to pay them can damage credit and . . . sometimes preclude adequate treatment and recovery from the very injuries caused. Just as importantly, the financial stress of being unable to pay medical expenses can lead to the ill-advised settlement of other legitimate claims in order to secure a benefit to which an innocent victim of an . . . accident is clearly entitled.

Ridley, 286 Mont. at 335, 951 P.2d at 993. We explained the limits of our holding, however, stating:

> This does not mean that an insurer is responsible for all medical expenses submitted by an injured plaintiff. Liability must be reasonably clear for the expense to be submitted. That is, even though liability for the accident may be reasonably clear, an insurer may still dispute a medical expense if it is not reasonably clear that the expense is causally related to the accident in question.

Ridley, 286 Mont. at 334, 951 P.2d at 992. We later expanded our holding in *Ridley* when we decided *Dubray*, determining advance payments should include "[l]ost wages which are reasonably certain and directly related to an insured's negligence or wrongful act . . . ." *Dubray*, ¶ 15.

[21] ¶31 BNSF, pointing to 45 U.S.C. §§ 51 and 53, asserts that the UTPA's advance payment obligation interferes with an employer's right under FELA to only be held liable for those damages determined by a

jury at trial. "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence' and . . . is 'part and parcel of the remedy afforded railroad workers under the [FELA].'" *Dice*, 342 U.S. at 363, 72 S. Ct. at 315, 96 L. Ed. 2d at 404 (quoting *Bailey v. Central V. Ry.*, 319 U.S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444, 1448 (1943)). BNSF's argument is misplaced.

¶32 First, it bears noting at the outset that Dannels made no demand for advance payment of either his wage loss or medical bills *until after* the jury had rendered a verdict in his FELA claim; nor did Dannels seek a declaratory judgment establishing BNSF's obligations to advance pay his wage loss or medical bills. Therefore, whether, and to what extent, these rights and obligations under the UTPA may conceivably conflict with a railroad's payment obligations under the FELA is not an issue that is squarely before us and we decline to speculate on Dannels' right to take hypothetical actions. *Independence Med. Supply, Inc. v. Mont. Dep't of* Pub. *HHS*, 2018 MT 57, ¶ 37, 391 Mont. 1, 414 P.3d 781 ("This Court has consistently held that we will not render advisory opinions.").

¶33 However, BNSF does not just argue that the FELA preempted Dannels' ability to file a declaratory judgment action, which he did not file, or seek advance payment of medical expenses and wage loss, which he did not seek. BNSF also argues that the FELA preempts a railroad workers' right to seek redress for *all* bad faith conduct in the adjustment of a claim. We disagree.

¶34 Assuming, for the sake of argument, that the UTPA's advance pay obligations may conflict with any provisions of the FELA, this still would not provide

a basis for the total preemption for which BNSF advocates. At most, it may provide a basis to foreclose a declaratory judgment action regarding advance pay obligations or for limiting the grounds upon which a worker may later seek bad faith damages under either the UTPA or the common law. But as we discussed above, there is a wide array of conduct that is proscribed by Montana's bad faith laws wholly exclusive of the advance pay obligations. BNSF's argument would effectively immunize it from all bad faith conduct. Like all states, Montana has an overriding interest in protecting its citizens from fraudulent, malicious, and bad faith claims practices and the infliction of intentional emotional injury, regardless of the source of that conduct. Sections 33-18-101, MCA, *et seq*. In light of the well-established remedial and humanitarian purpose of the FELA, it would be ironic, to say the least, if the FELA were to be used as a shield to immunize railroads from any accountability for all bad faith claims handling.

¶35 BNSF's obligations to adjust a claim in good faith do not impinge upon its right to a jury trial under the FELA any more than any other party's obligation to act in good faith when adjusting a personal injury claim that is not brought under the FELA. They are two separate actions, providing two distinct remedies for two distinct courses of conduct, for damages that are wholly independent of each other. Indeed, this case illustrates this very point. In the FELA action, BNSF successfully sought to exclude reference to any damages Dannels may have sustained that were not directly related to his "physical injury." After the jury found in Dannels' favor, BNSF ultimately paid the judgment for Dannels' physical injury. The appeal presently before us is from a final judgment, to which BNSF stipulated, compensating Dannels for damages

he sustained as a result of BNSF's claims handling, subsequent and in addition to the physical injuries that formed the basis of his FELA claim.

CONCLUSION

¶36 Because Dannels made no demand for advance payment of either his wage loss or medical bills until after the jury had rendered a verdict in his FELA claim, and he did not seek a declaratory judgment on these issues, we decline to address whether these discrete claims may be preempted by the FELA. Regarding BNSF's argument that the FELA preempts a railroad workers' right to seek redress for *all* bad faith conduct in the adjustment of a claim, we affirm the District Court's holding that it does not.

We Concur:

MIKE McGRATH, C. J.

INGRID GUSTAFSON, J.

AMY EDDY, J.

District Court Judge Amy Eddy sitting for Justice Laurie McKinnon

Justice Dirk Sandefur, specially concurring.

¶37 I concur in the Court's opinion to the extent that it holds that FELA does not preempt a related but independent Montana law duty requiring railroads to handle FELA claims in a fair and reasonable manner under the particular facts and circumstances of each case in accordance with governing FELA standards of liability. However, contrary to the underlying presumption of the parties upon which the Court's analysis is predicated, I would hold that the UTPA bad faith claim provided in § 33-18-242, MCA, does not apply to BNSF because it is neither an

"insurer," nor an entity "utilizing self-insurance" as referenced in § 33-18-242(8), MCA. I would further hold, however, that BNSF is nonetheless subject to a Montana common law claim for tortious FELA claims handling based on violation of the implied contract covenant of good faith and fair dealing and the special relationship between BNSF and injured workers in the FELA context.

A. BNSF Is Not an "Insurer" or Entity "Utilizing Self-Insurance" as Narrowly Recognized Under Montana Law.

¶38 The UTPA is an integral component of the Montana Insurance Code. *See* §§ 33-1-101 and 33-18-101, MCA. At all times pertinent, the purpose of the Insurance Code has been to regulate the "transact[ion]" of the "business of insurance," as narrowly-defined by the Code. *See* §§ 33-1-101, -102, -201, 33-2-101, and -106, MCA. The narrower purpose of the UTPA has been to "regulate trade practices in the business of insurance" by "defining . . . and . . . prohibiting" unfair and deceptive "trade practices." Section 33-18-01, MCA.

¶39 Prior to 1987, the UTPA expressly proscribed various unfair insurance claims handling practices, but provided no express private cause of action for damages in tort when violated by insurers. *See* § 33-18-201, MCA (1977 Mont. Laws ch. 320, § 1). Independent of the UTPA, and based on the common law covenant of good faith and fair dealing implied as a matter of law in all contracts, insurers had a common law tort duty to their insureds, as parties to the insurance contract and in special relation to the insured thereunder, to settle first-party insurance claims within policy limits when liability under the policy was reasonably clear. *See Gibson v. W. Fire Ins.*

Co., 210 Mont. 267, 274-75, 682 P.2d 725, 730 (1984); *Lipinski v. Title Ins. Co.*, 202 Mont. 1, 15-16, 655 P.2d 970, 977 (1982) (citing *First Sec. Bank v. Goddard*, 181 Mont. 407, 419-20, 593 P.2d 1040, 1047 (1979)). *Accord Stephens v. Safeco Ins. Co. of Am.*, 258 Mont. 142, 145, 852 P.2d 565, 567-68 (1993) (citing *Lipinski* and *Goddard*). First-party claimants thus had a common law tort remedy against insurers for breach of that duty (*i.e.*, an insurance bad faith claim). *See Gibson*, 210 Mont. at 274-75, 682 P.2d at 730; *Lipinski*, 202 Mont. at 15-16, 655 P.2d at 977 (citing *Goddard*, 181 Mont. at 419-20, 593 P.2d at 1047). *Accord Stephens*, 258 Mont. at 145, 852 P.2d at 567-68 (citing *Lipinski* and *Goddard*). In contrast, as third parties to the insurance contract, third-party claimants had no similar common law remedy against insurers for failure to reasonably settle third-party liability claims against their insureds.

¶40 In 1983, in the absence of an express private remedy for violation of UTPA-proscribed unfair insurance claims handling practices, we recognized an implied third-party UTPA-based tortious bad faith claim against insurers. *Klaudt v. Flink*, 202 Mont. 247, 252, 658 P.2d 1065, 1067 (1983) (recognizing implied private right of action for damages based on violations of § 33-18-201(6), MCA), *overruled in part on other grounds by Fode v. Farmers Ins. Exch.*, 221 Mont. 282, 286-87, 719 P.2d 414, 416-17 (1986).[1]

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[1] Though we later anomalously referred to the *Klaudt* claim as a "common law" claim, it was more accurately an implied statutory private right of action implied from the then-remediless unlawful insurance trade practices proscribed by § 33-18-201, MCA. *See O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 243-44, 859 P.2d 1008, 1014-15 (1993) (characterizing *Klaudt* claim as "common law cause of action" predicated on violations of § 33-18-201, MCA); *compare Klaudt*, 202 Mont. at 250-52, 658 P.2d at

However, in 1987, motivated by the perceived need to ameliorate the effect of the *Klaudt* claim on business insurance rates, the Legislature considered a purported tort-reform bill primarily intended to "swing[ ] the pendulum back" by superseding it with a more limited independent statutory insurance bad faith claim, narrowly predicated on alleged violations of a specified subset of the unlawful trade practices proscribed in § 33-18-201, MCA. *See Bill to Revise Law Relating to Insurance Bad Faith Claims*, H.R. 240, 50th Leg., Reg. Sess. (1987); *House Judiciary Committee Hearing Minutes on House Bill 240*, 50th Leg., Reg. Sess. (Jan. 27, 1987); *Executive Session of House Judiciary Committee Hearing Minutes on House Bill 240*, 50th Leg., Reg. Sess. (Feb. 19, 1987); *Senate Business and Industry Committee Hearing Minutes on House Bill 240*, 50th Leg., Reg. Sess. (Mar. 9-11, 1987); and *Executive Session of Senate Business and Industry Committee Hearing Minutes on House Bill 240*, 50th Leg., Reg. Sess. (Mar. 12, 1987). The bill became law and § 33-18-242, MCA, has remained unchanged since. *See* § 33-18-242, MCA (1987 Mont. Laws ch. 278, § 3).

¶41 The new independent statutory insurance bad faith claim was and remains expressly available to both first- and third-party claimants. Section 33-18-

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1066-67 (stating issue as whether § 33-18-201, MCA, "confers a private cause of action" and holding that § 33-18-201, MCA, created duties to third-party claimants, a breach of which is "the basis for a civil action"); *Fode*, 221 Mont. at 284-86, 719 P.2d at 415-16 (recognizing *Klaudt* claim as a UTPA-based claim rather than a common law claim). *See also Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 2016 MT 111, ¶¶ 41-42, 383 Mont. 346, 371 P.3d 446 (distinguishing statutorily-implied tort claims based on violations of statutory duty from common law claims based on violations of independent common law duties).

242(1), MCA. While the focus of the legislative impetus for the new action was on limiting the perceived adverse effect of the *Klaudt* claim, the new statute also expressly abolished and precluded independently recognized first-party common law bad faith claims. Section 33-18-242(3), MCA. Consistent with the language of § 33-18-201, MCA, and the common law standards from which it derived,[2] § 33-18-242, MCA, also expressly clarified that insurers had no statutory bad faith liability if a reasonable basis in fact or law existed for contesting liability or the amount of the claim. Section 33-18-242(5), MCA. The new statute further expressly provided that claimants did *not* have to prove, as otherwise required by the language of § 33-18-201, MCA, that an alleged UTPA claims handling "violation[ ] [was] of such frequency as to indicate a general business practice." Section § 33-18-242(2), MCA. *Compare* § 33-18-201, MCA. However, in an apparently uncontemplated quirk, the limited language of § 33-18-242, MCA, did not supplant the "common law" *Klaudt* claim it was intended to curb. *See Brewington v. Emp'rs Fire Ins. Co.*, 1999 MT 312, ¶¶ 14-19, 297 Mont. 243, 992 P.2d 237. *Compare* § 33-18-242(3), MCA.

¶42 Prior to enactment of § 33-18-242, MCA (1987), and by operation of the narrow Insurance Code definitions of "insurance" and "insurer," individuals and entities not primarily engaged in the business of providing contracts of insurance were not regulated "insurers," and thus not subject to § 33-18-201, MCA,

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[2] *See White v. State ex rel. Montana State Fund*, 2013 MT 187, 44 17-30, 371 Mont. 1, 305 P.3d 795 (noting that UTPA-specified unfair trade practices derived from application of common law implied covenant of good faith and fair dealing in first-party insurance claim context).

and related tort liability under the UTPA-based *Klaudt* claim. *See Ogden v. Montana Power Co.*, 229 Mont. 387, 391-93, 747 P.2d 201, 204-05 (1987) (holding that a public power utility was not an "insurer" for purposes of § 33-18-201, MCA, and *Klaudt* tort claim). *Accord Martel v. Montana Power Co.*, 231 Mont. 96, 108, 752 P.2d 140, 147 (1988). In *Ogden*, which like *Martel* involved a pre-1987 *Klaudt* claim alleging that the Montana Power Company unreasonably failed to settle a third-party negligence claim arising from a power line accident, we noted in passing that the Legislature had recently enacted § 33-18-242, MCA, which, *inter alia*, expressly applied the new statutory bad faith claim not only to insurers but also to "self-insurers." *Ogden*, 229 Mont. at 393, 747 P.2d at 205. However, almost 35 years later, we have never had occasion to consider the meaning and intent of § 33-18-242(8), MCA (extending statutory insurance bad faith liability beyond insurers to those "*utilizing self-insurance* to pay claims made against them" (emphasis added)).

¶43 As a preliminary matter, § 33-18-242(8), MCA, was not present in the original bill introduced before the House Judiciary Committee in 1987. *See Bill to Revise Law Relating to Insurance Bad Faith Claims*, H.R. 240, 50th Leg., Reg. Sess. (1987). It was mysteriously inserted without explanation or controversy in Executive Session before the bill passed out to the House floor. *See Executive Session of House Judiciary Committee Hearing Minutes on House Bill 240*, 50th Leg., Reg. Sess. (Feb. 19, 1987); *H.R. Journal*, 50th Leg., Reg. Sess., 762-63, 885, 909-10, 1379 (1987).[3] Nor was the subsection (8) self-

[3] Subsection (8) was included in the bill with other amendments in regard to which the legislative intent and purpose was

insurance provision explained, discussed, or even referenced in any of the subsequent Senate proceedings on the bill. *See Senate Business and Industry Committee Hearing Minutes \on House Bill 240*, 50th Leg., Reg. Sess. (Mar. 9-11, 1987); *Executive Session of Senate Business and Industry Committee Hearing Minutes on House Bill 240*, 50th Leg., Reg. Sess. (Mar. 12, 1987); *S. Journal*, 50th Leg., Reg. Sess., 815, 884, 904, 938 (1987). The legislative history of § 33-18-242, MCA, thus includes no indication of the perceived necessity or intended purpose for extending the new statutory insurance bad faith liability beyond "insurers" to those "utilizing self-insurance to pay claims made against them." In contrast to the precise

Insurance Code definitions of "insurance" and "insurer," the bill and ultimate statute did not define the term "self-insurance" and, to this day, the term remains undefined in the UTPA and larger Insurance Code. Section 33-18-242(8), MCA, is thus facially vague or ambiguous as to whether the reference to those "utilizing self-insurance" broadly refers to all who simply have no insurance coverage for a particular type of liability claim and must thus necessarily "pay claims made against them" by other means or, alternatively, more narrowly refers only to those who have affirmatively elected and qualified to be a government-approved "self-insured" in accordance with

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manifest without need for explanation or definition on the face of the amended bill. See § 33-18-242(5)-(7), MCA, regarding the "reasonable basis in law or in fact" defense, specified periods of limitations for the new statutory claim, and a procedural bifurcation requirement based on former § 33-18-241, MCA, and *Fode*, 221 Mont. at 287, 719 P.2d at 417. *See also Executive Session of House Judiciary Committee Hearing Minutes on House Bill 240*, 50th Leg., Reg. Sess. (Feb. 19, 1987).

a preexisting statutory scheme apart from the Insurance Code.

¶44 In that regard, nothing in the legislative history of § 33-18-242, MCA, manifests or suggests any legislative intent or purpose to broadly subject every individual or entity who technically has no third-party insurance coverage for particular types of claims to insurance bad faith liability under §§ 33-18-201 and -242(1), MCA, absent a reasonable basis in fact or law for disputing liability or the amount of a claim. To the contrary, the legislative history of § 33-18-242, MCA, indicates that the sole legislative impetus was to ameliorate the perceived adverse effect of the *Klaudt* claim by displacing it with an express statutory tort remedy more limited in scope and effect. Further indicating the complete absence of any legislative intent to significantly expand the scope of tort liability under the new statutory insurance bad faith claim are the historical facts that § 33-18-242, MCA, was a tort reform measure in which the subject "self-insurance" provision was inconspicuously included in a package of other more prominent amendments without explanation or controversy. As a matter of law, the Legislature is presumed to be fully aware of the substance and effect of its prior enactments. Under the totality of these circumstances, the only reasonably conceivable explanation for the complete absence of explanation, definition, reference, or controversy regarding the "self-insurance" provision in the otherwise controversial bill was that the technical meaning of the term "self-insurance" was already established and well-known to the Legislature through other prior enactments.

¶45 In pertinent part, the Insurance Code has at all times pertinent narrowly defined the terms "insurance" and "insurer," to wit:

> "*Insurance*" is a *contract* through which one undertakes *to indemnify another or pay or provide* a specified or determinable amount or benefit *upon determinable contingencies*.
>
> "*Insurer*" includes every person *engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance*.

Section 33-1-201(5)(a) and (6), MCA (emphasis added).[4] The Code has at all times further defined the derivative terms "authorized insurer," "domestic insurer," "foreign insurer,"and "alien insurer," and specified for all that no "person acting as an insurer" may "transact[ ] insurance in this state" without a prior "certificate of authority issued by the [insurance] commissioner" in accordance with the requirements of §§ 33-2-106 and -115 through -117, MCA. Sections 33-1-201(1)-(4), (9), and 33-2-101, MCA. *See also* § 33-1-201(10), MCA (defining the term "unauthorized insurer").

¶46 Against that precisely-defined statutory backdrop, the concept of "self-insurance"was already established and well-known to the Legislature prior to 1987 in the Montana Workers' Compensation Act (Work-Comp Act) and the Montana Motor Vehicle

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[4] It is of further note that, at all times pertinent, the limited purpose of the Insurance Code has been to regulate the "transact[ion] [of the] business of insurance" or "insurer transacti[on] [of] insurance," and that the limited purposes of the UTPA thereunder has been to "regulate [unfair or deceptive] trade practices in the business of insurance." Sections 33-1-102(1), 33-2-101(1), and 33-18-101, and -102, MCA.

Insurance Responsibility and Verification Act (MVIRVA). Under the Work-Comp Act, Montana employers have at all times pertinent had three options by which to provide mandatory workers' compensation insurance benefits to employees. First, there were and remain two options for acquiring the requisite insurance coverage from third-party providers—under an insurance policy provided by a Montana-regulated "insurer" or by coverage acquired from the statutory "state fund." Section 39-71-2201, et seq., MCA (Plan 2 private insurance option);[5] Title 39, chapter 71, part 23, MCA (Plan 3 state fund option). As the third option, employers could and can elect, upon "permission" of the responsible state agency, to "provide *self-insured* workers' compensation benefits for their employees." Sections 39-71-2101 and -2103, MCA (Plan 1 self-insurance option). In order to obtain "permission" to provide self-insured workers' compensation benefits, the Work-Comp Act has at all times required applicants to "*furnish*[ ] *satisfactory proof* . . . of *solvency and financial ability to pay* the compensation and benefits provided [under the Act] . . . *and to discharge all liabilities* . . . reasonably likely to be incurred" during the subject time period. Section 39-71-2101(1), MCA (1915 Mont. Laws ch. 96, § 30) (emphasis added). *See also* § 39-71-116(17), MCA (defining "insurer" as referenced in the Work-Comp Act to *inter*

[5] As of 2007, employers can also obtain the requisite Plan 2 workers' compensation insurance coverage from a "captive reciprocal insurer established by or on behalf of any employer or a group of employers." Section 39-71-2201(3), MCA (2007 Mont. Laws ch. 117, § 10). However, "captive" insurance companies were not authorized to transact insurance in Montana until after 2001, and then only as regulated under the Insurance Code. *See* §§ 33-28-101, -102, et seq., MCA (2001 Mont. Laws ch. 298, § 1, as amended by 2003 Mont. Laws ch. 383, §§ 8-9).

alia include employers who elect to be "bound by compensation plan No. 1").

¶47 Similarly, for purposes of the MVIRVA mandatory motor vehicle liability insurance requirement, "[a]ny person in whose name more than 25 motor vehicles are registered may qualify as a *self-insurer* by obtaining a *certificate of self-insurance* issued by the [Montana Department of Justice]." Section 61-6-143(1), MCA (1951 Mont. Laws ch. 204, § 34) (emphasis added). MVIRVA self-insurance certificates are available only on verification of the requisite fleet requirement and satisfactory proof that the applicant "is possessed and will continue to be possessed of ability to pay judgments obtained against such person." Section 61-6-143(2), MCA (1951 Mont. Laws ch. 204, § 34). For purposes of a certificate of self-insurance, "[p]roof of financial responsibility" means "proof of ability to respond in damages for liability on account of accidents occurring subsequent . . . [thereto and] arising out of the ownership, maintenance, or use of a motor vehicle." Section 61-6-102(9), MCA.

¶48 Thus, as manifest in the Work-Comp Act and MVIRVA, there has been at all times pertinent a significant and well-known technical legal distinction under Montana law between affirmatively government-approved "self-insurers" and others who, for whatever reason, technically have no insurance coverage for a type of liability claim and must pay through other means when necessary. We must construe statutory terms or phrases that have technical meaning in accordance with any "peculiar and appropriate meaning [acquired] in law." Section 1-2-106, MCA. Here, as referenced in § 33-18-242(8), MCA, and in the absence of a contrary statutory provision, the phrase individ-

ual or entity "utilizing self-insurance" has technical legal meaning referring only to those who affirmatively obtain statutorily-specified government approval or verification to self-insure or utilize self-insurance for liabilities within the scope of a statutorily-mandated form or level of insurance, such as compulsory workers' compensation or automobile liability insurance, for example.

¶49 In the context of construing a standard insurance policy "other insurance" provision, the New Jersey Superior Court, Appellate Division, long ago aptly explained the significant distinction between the broad colloquial meaning of "self-insurance" and the more narrow technical legal meaning of the term under a state insurance regulatory scheme similar to ours, to wit:

> We start from the premise that so-called *self-insurance is not insurance at all. It is the antithesis of insurance.* The essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer. The essence of *self-insurance,* a term of *colloquial currency rather than of precise legal meaning*, is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract. . . . Clearly then, [in the broadest colloquial sense,] [any]one may be regarded as a self-insurer as to any risk of loss to which he is subject and which is susceptible to insurance coverage but as to which he has not obtained such coverage. . . . *But* as a matter both of common sense and the fundamentals of insurance law, *a failure to purchase obtainable insurance is not itself insurance.* That failure *simply and inevitably means*

> *that there is no insurance for that risk*. Thus, the undertaking to self-insure cannot, by definition, be regarded as insurance.

Am. Nurses Ass'n v. Passaic Gen. Hosp., 192 N.J.Super. 486, 471 A.2d 66, 69 (1984) (internal citations omitted), *reversed in part on other grounds*, 98 N.J. 83,484 A.2d 670 (1984).[6] However, in contrast to "the general, imprecise and amorphous concept of self-insurance," the New Jersey Court further recognized that:

> there is *one type of self-insurance* . . . [*with*] *a legally-recognized identity* and a *clearly*

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[6] *See also Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal.4th 38, 70 Cal.Rptr.2d 118, 948 P.2d 909, 930 n.20 (1997) ("[i]n a strict sense, 'self-insurance' is a 'misnomer[ ]' . . . '[s]elf-insurance is equivalent to no insurance'" (internal citations omitted)); *Aetna Cas. & Sur. Co. v. World Wide Rent-A-Car, Inc.*, 28 A.D.2d 286, 284 N.Y.S.2d 807, 809 (1967) (auto liability self-insurance is not insurance); *State Farm Mut. Auto. Ins. Co. v. Du Page Cty*, 352 Ill.Dec. 891, 955 N.E.2d 67, 74-75 (App. 2011) (county that is colloquially self-insured "is not an insurer or an insurance company"—"[a]n insurance policy is a contract requiring two parties, an insurer and an insured"); *State v. Continental Cas. Co.*, 126 Idaho 178, 879 P.2d 1111, 1116 (1994) (self-insurance is not insurance "[b]ecause [it] does not involve a transfer of the risk of loss"—merely "a retention of that risk"); *Cordova v. Wolfel*, 120 N.M. 557, 903 P.2d 1390, 1392 (1995) ("[m]ost authorities agree that self-insurance is not insurance"—"[i]nsurance is a contract whereby for consideration one party agrees to indemnify or guarantee another party against specified risks"); *Am. Family Mut. Ins. Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110 (Mo. 1974) (auto liability self-insurance is not insurance); *Eakin v. Indiana Intergovt'l Risk Mgmt. Auth.*, 557 N.E.2d 1095, 1101 (Ind. Ct. App. 1990) (colloquial self-insurance through risk-pooling is not insurance because "the risks and costs of civil liability are completely internalized among [the] participants" without "shift[ing] the risk to for-profit risk takers"—quoting *Antiporek v. Vill. of Hillside*, 114 Ill.2d 246, 102 Ill.Dec. 294, 499 N.E.2d 1307 (1986)).

> *defined consequence*. We refer to the situation in which [a] *compulsory liability insurance* . . . [scheme] provides that a person subject to the mandate may, *in accordance with specified standards and upon a satisfactory showing of financial ability to bear the risk, be exempted from the obligation to purchase insurance* upon issuance by a designated administrative officer or agency of a certificate of self-insurance. . . . This *qualified self-insurance*, as it may be termed for convenience in reference, has been held to require the self-insurer to provide the public sought to be protected by the compulsory insurance with the same "coverage" and incidents of "coverage" as he would have had to have purchased but for the certificate of self-insurance.

Am. Nurses Ass'n, 471 A.2d at 69 (emphasis added).[7]

¶50 Here, it is beyond genuine material dispute that, as an interstate common carrier, BNSF is not an "insurer" engaged in the transaction of the "business of insurance" as referenced and defined in §§ 33-1-102(1), -201(1)-(6), (9), and 33-18-101, MCA. As a state

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[7] *See also Martin v. Powers*, 505 S.W.3d 512, 519-20 (Tenn. 2016) (noting "many formal procedures . . . whereby an entity can become recognized as a self-insurer" under state law, "most commonly . . . by filing a bond or furnishing another form of proof of the ability to pay amounts for which the self-insurer may become liable" (internal punctuation and citation omitted)); *United Nat. Ins. Co. v. Philadelphia Gas Works*, 221 Pa.Super. 161, 289 A.2d 179, 181 (1972) (a certificate of self-insurance under a mandatory motor vehicle liability scheme "is not an insurance policy . . . [its] purpose . . . is the protection of the public against an owner of vehicles"—not to ensure indemnification of individual tortfeasors (citing *Farm Bureau Mut. Auto. Ins. Co. v. Violano*, 123 F.2d 692, 696 (2d Cir. 1941)).

law matter, BNSF is thus not subject to the Montana Insurance Code or UTPA, unless as an entity "utilizing self-insurance to pay claims made against [it]," as referenced in § 33-18-242(8), MCA. In that regard, the Montana Work-Comp Act does not apply to BNSF as a matter of law, and the underlying FELA claim at issue does not arise as a matter of fact or law within the scope of the MVIRVA. Nor does it arise under any similar compulsory insurance scheme under Montana law.

¶51 Dannels nonetheless implicitly asserts that BNSF "utilizes self-insurance" as referenced in § 33-18-242(8), MCA, because it "is reimbursed" for FELA claim payouts by a "captive" company, "BNSF Insurance," a Bermuda-incorporated entity through which BNSF "participates in reinsurance pooling agreements with other railroads." (Emphasis added.) However, taking his description of "BNSF Insurance" as true, Dannels as a matter of law cannot demonstrate that BNSF's alleged reinsurance pooling agreements with other railroads through an unregulated "captive" subsidiary either constitute "insurance" or "self-insurance" as narrowly recognized under Montana law and referenced in § 33-18-242(8), MCA.[8] Dannels

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[8] Even under an alternative "insurer" or "captive insurer" theory of liability under § 33-18-242, MCA, Dannels has made no assertion, much less showing, that either BNSF or "BNSF Insurance" is a "foreign insurer," "alien insurer," or "authorized insurer," as defined and regulated under §§ 33-1-201(1)-(6), (9), 33-2-101, -106, and -115 through -117, MCA, and engaged in the transaction of the business of insurance in Montana as referenced in §§ 33-1-102(1) or 33-18-101, MCA. Moreover, while "captive insurers," including reciprocal captive insurers, *inter alia*, may now transact insurance under Montana law, they may do so only subject to regulation under the Montana Insurance Code upon advance issuance of a "certificate of authority" issued

cannot distinguish BNSF's "reinsurance" pooling agreements through an unregulated "captive" subsidiary as anything more than an example of the "myriad" of "customary [non-insurance] private indemnity agreement[s]" distinguished by the New Jersey Court from true insurance or statutorily qualified self-insurance, to wit:

> The . . . question [arises as to] whether there should be any different result when the nature of the *self-insured risk* of loss is an *obligation to indemnify*. We do not perceive any viable conceptual basis for ascribing different consequences to that risk of loss. . . . It is clear that all contracts of insurance are, basically, indemnity agreements. But *all indemnity agreements are not insurance contracts*. . . . As a matter of common understanding, usage, and legal definition, an insurance contract denotes a policy issued by an authorized and licensed insurance company whose primary business it is to assume specific risks of loss of members of the public at large in consideration of the payment of a premium. There are, however, other risk-shifting agreements which are not insurance contracts. These include the customary *private indemnity agreement where affording the indemnity is not the primary*

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upon qualification by the Montana insurance commissioner. *See* § 33-28-102(2), MCA. Dannels has neither stated, nor shown, any reason to believe that "BNSF Insurance" is a regulated "captive insurer" authorized to transact business in Montana. He has further failed in any event to allege or show that "BNSF Insurance" was in any manner directly involved in the actual handling of the FELA claim at issue or FELA claims in general.

> *business of the indemnitor and is not subject to governmental regulation but is merely ancillary to and in furtherance of some other independent transactional relationship between the indemnitor and the indemnitee*. The indemnity is, thus, not the essence of the agreement creating the transactional relationship but is only one of its negotiated terms . . . . There are myriad other examples.

Am. Nurses Ass'n, 471 A.2d at 70-71 (emphasis added).[9] Thus, contrary to Dannels' implied assertion, BNSF is in any event not a "self-insurer" or entity "utilizing self-insurance" for FELA claims as recognized under Montana law and referenced in § 33-18-242(8), MCA.

¶52 At bottom as to FELA claims, whatever the structure of its unregulated subsidiary "BNSF Insurance," BNSF is neither an "insurer," nor an entity that "utilizes self-insurance" as narrowly recognized under Montana law. On this record, it is no more than a technically-uninsured private entity, primarily engaged in business as a common carrier of freight, and which participates in non-insurance liability indemnification agreements with other non-insurer railroads through a wholly owned subsidiary not regulated for that purpose under Montana law. As a matter of law, BNSF is neither an "insurer," nor an entity utilizing "self-insurance," as referenced in § 33-18-242(1) and (8), MCA, and is thus not subject to liability for unfair FELA claims handling practices under § 33-18-242, MCA.

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[9] *See also Crone v. Crone*, 2003 MT 238, ¶ 30, 317 Mont. 256, 77 P.3d 167 (insurance is only one form of contract indemnity with another).

B. BNSF Has a First-Party Common Law Duty of Good Faith and Fair Dealing Under Montana Law to Reasonably Investigate and Settle FELA Claims When FELA Liability Is Reasonably Clear.

¶53 The employment relationship between railroads and railroad workers is first and foremost a contractual relationship arising under and governed by Montana law, except to the extent preempted by applicable federal law. Sections 39-2-101 and -903(2), MCA; U.S. Const. art. VI. As a matter of fact, the contractual employment relationship between BNSF and its railway workers, including Dannels, is presumably governed by the terms of a collective bargaining agreement (CBA), as is typical, which are in turn governed by federal labor law, such as the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), and/or the Railway Labor Act (RLA), 45 U.S.C. § 151, et seq., as applicable.[10] As a matter of law, the LMRA and RLA separately preempt state law claims for relief that depend on application or interpretation of the express terms of CBAs in interstate commerce. Conversely, however, the LMRA and RLA do not preempt employee claims against employers predicated on alleged breach of independent legal duties that do not depend on interpretation or application of the express terms of an otherwise governing CBA. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260-66, 114 S. Ct. 2239, 2247-51, 129 L.Ed.2d 203 (1994) (noting that RLA preemption standard is "virtually identical to" the LMRA preemption standard recognized in *Allis-Chalmers Corp. v. Lueck*, 471 U.S.

[10] It is unclear and beyond the scope of the matters at issue to discern whether and to what extent Dannels is subject to a CBA governed by the RLA, LMRA, or both.

202, 220, 105 S. Ct. 1904, 1916, 85 L.Ed.2d 206 (1985)); *Pike v. Burlington N. R.R. Co.*, 273 Mont. 390, 398-401, 903 P.2d 1352, 1357-59 (1995) (citing *Hawaiian Airlines*).[11]

¶54 As a matter of state law, implied by law in every contract is a covenant of good faith and fair dealing that requires "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Section 28-1-211, MCA,[12] *Story v. City of Bozeman*, 242 Mont. 436, 449-50, 791 P.2d 767, 774-75 (1990). The covenant derives from the "justified expectation" of each party "that the other will act in a reasonable manner" within the framework of the express terms of the contract. *Story*, 242 Mont. at 450, 791 P.2d at 775. The extent of the implied covenant thus depends upon the justified expectations of the parties under the totality of the

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[11] *Accord Winslow v. Montana Rail Link, Inc.*, 2000 MT 292, ¶¶ 14-27, 302 Mont. 289, 16 P.3d 992 (state statutory wrongful discharge and noninjury-based negligent railroad management claims not preempted by LMRA or RLA where not based on an alleged breach, or interpretation or application of, an express term of the CBA); *Foster v. Albertsons, Inc.*, 254 Mont. 117, 123-28, 835 P.2d 720, 724-27 (1992) (state common law wrongful discharge claim based on tortious breach of implied covenant of good faith and fair dealing preempted by LMRA because proof dependent on interpretation or application of express terms of LMRA-governed CBA, but not independent state law claim for retaliatory discharge regarding sexual harassment claim not predicated or dependent on express terms of the CBA); *Smith v. Montana Power Co.*, 225 Mont. 166, 169-71, 731 P.2d 924, 926-27 (1987) (common law wrongful discharge claim based on alleged tortious breach of implied covenant of good faith and fair dealing preempted by LMRA where proof of the claim was "substantially dependent" on express terms of the LMRA-governed CBA).

[12] *See also* §§ 30-1-201(2)(u) and -203, MCA (UCC recognition of implied covenant of good faith).

circumstances under the particular contractual setting at issue. *See Hardy v. Vision Serv. Plan*, 2005 MT 232, ¶¶ 13-17, 328 Mont. 385, 120 P.3d 402. By nature, proof of breach of the implied covenant of good faith and fair dealing does not require or depend on proof of breach of an express contract term. *Story*, 242 Mont. at 450, 791 P.2d at 775. Proof of an alleged breach of the implied covenant merely requires proof that the offending party acted within the framework of the express contract in a manner that was an unreasonable deviation from prevailing commercial standards of reasonableness in the trade at issue. *See Story*, 242 Mont. at 448-50, 791 P.2d at 774-75. *Accord Phelps v. Frampton*, 2007 MT 263, ¶ 29, 339 Mont. 330, 170 P.3d 474; *Hardy*, ¶ 13; *Weldon v. Montana Bank*, 268 Mont. 88, 94-95, 885 P.2d 511, 515 (1994).

¶55 In the context of FELA and the underlying relationship between a railroad and union railway workers, the CBA is the base employment contract which, in pertinent essence, expressly provides that covered railroad workers will perform assigned work as directed in return for specified wages and benefits in accordance with the CBA, subject to specified discipline and discharge provisions and rules. Upon formation of the employment contract, FELA independently imposes on railroads a federal statutory duty to compensate workers for work-related injuries in accordance with its remedial standard of liability.[13]

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[13] Congress enacted FELA for the humanitarian purpose of ameliorating the harsh common law obstacles that previously impeded railroad workers from obtaining compensation for work-related injury. *See* 45 U.S.C. § 51; *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542-43, 114 S. Ct. 2396, 2403-04, 129 L.Ed.2d 427 (1994) ("[c]ognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy that

As a matter of law, the net effect of the railroad employment contract, FELA, and covenant of good faith and fair dealing implied in the contract as a matter of law is the mutual expectation of the parties that the employing railroad will fairly and reasonably compensate its workers for work-related injury in accordance with FELA liability standards. Accordingly, by operation of the implied covenant of good faith and fair dealing overlaying the employment contract in the FELA context, employing railroads have an implied Montana common law contract duty to handle Montana-accrued FELA claims in a manner that is reasonable under the facts and circumstances of each case in accordance with the governing FELA standard of liability.

¶56 As previously held in *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, 312 Mont. 498, 60 P.3d 418, and again today, under the erroneous presumption procedurally foisted on the Court by the parties' stipulation below that the UTPA applies to railroads operating in Montana,[14] FELA

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shifted part of the 'human overhead' of doing business from employees to their employers" (internal citations omitted)).

[14] Unlike Dannels' asserted claim of UTPA liability here, *Reidelbach* did not involve an express UTPA insurance bad faith claim under § 33-18-242, MCA. *See Reidelbach*, ¶¶ 10 and 51. Rather, *Reidelbach* involved a UTPA-implied third-party *Klaudt* claim theory (citing *Brewington v. Emp'rs Fire Ins. Co.*, 1999 MT 312, 297 Mont. 243, 992 P.2d 237 and § 33-18-101, MCA) and, alternatively, an inconsistent first-party common law tortious bad faith claim based on alleged breach of the implied covenant of good faith and fair dealing (citing *Story v. City of Bozeman*, 242 Mont. 436, 791 P.2d 767 (1990)) with reference to an alleged qualifying special relationship between Reidelbach and BNSF. *See Reidelbach*, 44 10 and 51. As here, the focus in *Reidelbach was* on the narrow FELA preemption issue without analysis of whether the asserted state law claim even stated a cognizable

does not preempt an independent state common law fair claims handling duty implied from the employment contract because FELA neither imposes, nor precludes, such a related but distinct legal duty. Nor does such state law duty in any way impede or interfere with any purpose, provision, or operation of FELA for purposes of the federal field preemption doctrine. Despite that it would not arise as a matter of law in the absence of the underlying employment contract, the FLMA and the RLA, as applicable, similarly do not preempt such a duty because it arises as a matter of state law independent of the express terms of any otherwise governing CBA and is not dependent on interpretation or application thereof. *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-67, 107 S. Ct. 1410, 1413-16, 94 L.Ed.2d 563 (1987) (holding that recovery of emotional distress damages under FELA would not be inconsistent or in conflict with RLA collective bargaining scheme). Thus, neither FELA, nor the RLA/FLMA, preempt an implied Montana contract duty requiring railroads to handle FELA claims in a fair and reasonable manner in accordance with FELA liability standards.

¶57 However, as in the foregoing analysis of the inapplicability of § 33-18-242, MCA, to BNSF, a similar threshold state law question remains as to whether an independent common law tortious bad faith claims handling claim would lie against BNSF on its constituent elements. We have long recognized that Montana employers have an implied common law contract duty "to deal fairly and in good faith with [their] employees." *Morse v. Espeland*, 215 Mont. 148, 152, 696 P.2d 428, 430 (1985). *Accord Nicholson v.*

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claim for relief as applied to BNSF as a threshold matter of Montana law.

United Pac. Ins. Co., 219 Mont. 32, 40, 710 P.2d 1342, 1347 (1985) (internal citations omitted), *overruled in part on other grounds by Story*, 242 Mont. at 450, 791 P.2d at 775 (in re standard for tortious violation); *Weber v. Blue Cross of Montana*, 196 Mont. 454, 463-64, 643 P.2d 198, 203 (1982). While generally compensable only in contract by contract damages, *Hardy*, ¶ 13; *Story*, 242 Mont. at 450-51, 791 P.2d at 775-76, breach of the implied covenant is compensable in tort if the breach occurred in the context of a "special relationship" between the parties "not otherwise controlled by specific statutory provisions." *Story*, 242 Mont. at 451-52, 791 P.2d at 776. A special relationship giving rise to tort liability for breach of the implied covenant exists when:

(1) "the contract [is] such that the parties are in inherently unequal bargaining positions";

(2) the weaker party had a non-profit motivation for entering into the contract, such as "to secure peace of mind, security, [or] future protection";

(3) "ordinary contract damages are not adequate" to remedy the breach because they "do not require the party in the superior position to account for its [wrongful] actions" and are not adequate to "make the inferior party 'whole'";

(4) the weaker party "is especially vulnerable because of the type of harm [the party] may suffer" and the related necessity of placing trust in the stronger party to perform; and

(5) the stronger party is aware of the special vulnerability of the weaker party.

Story, 242 Mont. at 451-52, 791 P.2d at 776 (quoting *Wallis v. Superior Court*, 160 Cal. App.3d 1109, 207 Cal. Rptr. 123, 129 (1984)).

¶58 Here, Dannels' railroad employment is presumably governed by the express terms of the federally regulated CBA under which BNSF employed him. His ultimate entitlement to compensation for work-related injury is then independently governed by FELA. Neither govern, however, the question of whether BNSF handled his FELA claim in a fair and reasonable manner under the circumstances in accordance with governing FELA liability standards. Nor is that question governed by any other specific statutory scheme. Thus, a common law tortious FELA claims handling claim is "not otherwise controlled by specific statutory provisions" for purposes of the threshold *Story* criterion here.

¶59 Turning to the *Story* special relationship criteria, substantial parity presumably exists between BNSF and union railroad workers in the collective bargaining process, at least in regard to the general terms and conditions of employment. However, Dannels' entitlement to compensation for work-related injury under FELA is not dependent on the collective bargaining process or any resulting CBA. *See Buell*, 480 U.S. at 561-67, 107 S. Ct. at 1410-16. Moreover, like third-party claimants in the liability insurance context, injured railroad workers have no leverage, alternative, or remedy in the FELA claims handling and negotiation process other than the threat of FELA litigation, with nothing waiting in the end zone other than the compensation to which they would in any event be entitled under FELA liability standards from

the get-go, albeit as significantly reduced by the cost of attorney fees necessary to acquire it. As a result, it is distinctly possible for the railroad to either delay or deny settlement of an injured worker's FELA claim, without a reasonable basis in fact or law for doing so, for no reason other than to leverage a more advantageous settlement against an economically desperate worker. Such scenarios are particularly damaging to injured workers who are temporarily or permanently unable to continue working in their former railroad capacity as a result of a work-related disability. Regardless of the relative parity between them as to other conditions of employment, employing railroads and injured workers are in inherently unequal, widely-disparate bargaining positions regarding the railroad's handling of their FELA personal injury claims.

¶60 Under the second and third *Story* criteria, railroad workers unquestionably have a motive for economic gain in accepting and continuing railroad employment for wages and related benefits. As a matter of law, however, they have no legitimate motive or interest in economic gain in obtaining fair and reasonably prompt compensation for work-related personal injury due them under FELA. To that end, ordinary FELA damages compensate workers only for statutorily compensable injury and detriment caused by the subject work-related injury. FELA damages do not compensate injured workers for any additional provable harm caused by a railroad's failure to promptly settle a FELA claim in the absence of a reasonable basis in fact or law for contesting it. In that scenario, ordinary FELA damages are not only inadequate to make the injured claimant whole for the additional harm or detriment caused by unreasonable railroad intransigence in the claims handling process, but further provide no disincentive or deterrent

sufficient to hold the offending railroad to account for additional harm or detriment caused thereby.

¶61 As to the fourth and fifth *Story* criteria, railroad workers who suffer more than minor injuries that do not result in wage loss are particularly vulnerable to unreasonable railroad claims handling because, in addition to the temporary or permanent disabling nature of the injury on a worker's physical integrity and function, the worker also inevitably faces the related economic hardships of immediate wage loss, concomitant costs of medical treatment and necessities of life, and the impairment of ability to work in any other railroad or non-railroad capacity for some indefinite time into the future, if not permanently. Employing railroads are unquestionably aware of this special vulnerability. Therefore, all of the *Story* criteria for recognition of a special relationship giving rise to an independent tort duty and liability between contracting parties are therefore present here as a matter of law. Consequently, unlike the UTPA insurance bad faith claim asserted by Dannels, an independent Montana common law claim for tortious FELA claims handling is cognizable against BNSF.

¶62 Finally, by partial analogy to the UTPA standard of duty and liability, I would hold that the standard of duty for determining whether a railroad handled a FELA claim in a fair and reasonable manner is whether the railroad disputed the FELA claim without a reasonable basis in fact or law to dispute a material aspect of any of the essential elements of the claim under applicable FELA standards. *Cf.* §§ 33-18-201(6) and -242(5), MCA. In this context, whether a railroad had a reasonable basis in fact or law to dispute an essential element of a FELA claim is an objective standard based on consideration of

governing FELA liability standards as applied to the railroad's knowledge of the pertinent facts and circumstances then available. *Cf. Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 39, 357 Mont. 293, 239 P.3d 904.[15] As in the UTPA context, an ultimate finding by the trier of fact on the elements of a FELA claim has no bearing on whether the railroad earlier reasonably disputed the claim based on the then-available material facts known and applicable law. *Cf. Peterson*, ¶ 39.

¶63 However, because they are predicated in our UTPA bad faith jurisprudence on more specific statutory duties specified in § 33-18-201, MCA, I would hold that insurance-specific concepts and constructs, such as advance-pay requirements and related preliminary declaratory judgment procedures, *inter alia*, have no analogous application in the railroad claims settlement context.[16] To further ensure accomplishment of FELA's intended federal purpose free of abuse or other undue interference with a railroad's administration of FELA claims, I would further hold that a tortious FELA claims handling claim is not cognizable or ripe for filing against a railroad until after all aspects of the underlying liability claim are fully resolved by written settlement agreement or final judgment in favor of the claimant, whether pursuant

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[15] I would further hold by partial analogy to the UTPA that the railroad's duty to handle an asserted FELA claim *inter alia* includes the duty to conduct a reasonable investigation of the claim based on all pertinent information then available. *Cf.* § 33-18-201(4), MCA.

[16] I thus concur in Justice Rice's dissent to the extent that it points out the manifest incompatibility of such insurance-specific UTPA constructs and procedures with the FELA claims handling process.

to M. R. Civ. P. 12, 56, or on verdict or finding of the trier of fact. *Cf.* § 33-18-242(6)(b), MCA.

¶64 In summary, I would hold that the UTPA bad faith claim provided in § 33-18-242, MCA, and incorporated unfair insurance trade practices specified in § 33-18-201, MCA, do not apply to BNSF because it is neither an "insurer," nor an entity "utilizing self-insurance," as referenced in § 33-18-242(1) and (8), MCA. I would further hold, however, that BNSF is nonetheless subject to state common law liability for tortious FELA claims handling based on breach of the implied contract covenant of good faith and fair dealing in the context of the special relationship between BNSF and injured workers in the remedial FELA context. On that basis, I specially concur in Court's opinion to the extent that it holds that FELA does not preempt a related but independent state law duty requiring railroads to handle FELA claims in a fair and reasonable manner under the particular facts and circumstances of each case in accordance with the governing FELA liability standards.

¶65 I recognize unabashedly that the parties did not raise the state law issues analyzed in this special concurrence on appeal. However, I simply cannot and will not be a party to further perpetuation of the patently erroneous presumption, that BNSF is subject to UTPA tort liability for unfair insurance claims handling practices, foisted on the Court by the parties' stipulated narrow focus on whether FELA preempts that *only presumed* state law liability. As a mischievous result of the limiting effect of that stipulation on the scope of the Court's analysis, the majority opinion will, if otherwise left standing on such a shaky state law predicate on subsequent FELA field preemption review in federal court, be hereafter cited as a canon

holding that BNSF, an entity "utilizing self-insurance" in only the broadest colloquial sense under an undefined and unanalyzed statutory term, is subject to tort liability for violating UTPA-proscribed unfair *insurance* claims handling practices. Surely to follow will be the further expansive use of this holding to similarly impose new tort liability unintended by the Legislature on other persons and entities who are simply uninsured in the technical sense. I specially concur.

Justice Jim Rice, dissenting.

¶66 I would conclude that Dannels' Unfair Trade Practices Act (UTPA), §§ 33-18, MCA and Montana common law claims are preempted because the UTPA creates unique obligations and damages conflicting with the comprehensive and exclusive framework for railroad carrier liability under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (2021).

¶67 FELA is long recognized as the comprehensive and exclusive framework governing railroad employer's negligence. *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371, 73 S. Ct. 340, 342, 97 L.Ed. 395 (1953). *See also* 45 U.S.C. § 54a; 49 U.S.C. § 20106(a)(1). In enacting FELA, Congress undertook "*to cover the subject* of the liability of railroad companies to their employees injured while engaged in interstate commerce." *New York Cent. R. Co. v. Winfield*, 244 U.S. 147, 152, 37 S. Ct. 546, 548, 61 L.Ed. 1045 (1917) (emphasis added). FELA is a "broad remedial statute" and "defined in broad language, which has been construed even more broadly." *Atchison, Topeka & Santa Fe R.R. Co. v. Buell*, 480 U.S. 557, 561-62, 107 S. Ct. 1410, 1413, 94 L.Ed.2d 563 (1987) (footnotes omitted). FELA "establishes a rule or regulation which is *intended to operate uniformly* in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive." *New York Cent. & Hudson River R. Co. v. Tonsellito*, 244 U.S. 360, 361-62, 37 S. Ct. 620, 621, 61 L.Ed. 1194 (1917) (emphasis added). *See also Dice v. Akron Canton & Youngstown R. R. Co.*, 342 U.S. 359, 361, 72 S. Ct. 312, 314, 96 L.Ed. 398 (1952) (stating that "only if federal law controls can the federal Act be given that uniform application throughout the

country essential to effectuate its purposes") (citation omitted).[1]

¶68 Consequently, "Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State." *Tonsellito*, 244 U.S. at 362, 37 S. Ct. at 621. "We do not doubt that [FELA] . . . displaces any state law trenching on the province of the Act." *Ahern*, 344 U.S. at 371, 73 S. Ct. at 342 (1953). State laws are preempted when they stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in implementing a uniform system of regulation. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L.Ed. 581 (1941) (footnote omitted). In *Toscano v. Burlington N. R. R. Co.*, a Montana federal district court found that a claim based on Montana's common-law duty of good faith and fair dealing was preempted by FELA. *Toscano v. Burlington N. R. R. Co.*, 678 F. Supp. 1477 (D. Mont. 1987). *See also Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 335, 108 S. Ct. 1837, 1842, 100 L.Ed.2d 349 (1988) (providing that even though FELA does not address interest payments, it was error to assess prejudgment interest under state law); *Sinclair v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 424, ¶ 35, 347 Mont. 395, 200 P.3d. 46 (affirming dismissal of state law fraud claim as preempted by FELA).

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[1] Regarding uniformity, as Appellant BSNF's brief indicates, "[i]n every State except Montana, a FELA employer is entitled to contest liability and damages on the merits unencumbered by additional substantive state-law duties."

¶69 In conjunction with Montana's common law, the UTPA, particularly, as interpreted and applied in *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997), and its expanding progeny, provide both substantive and procedural state law remedies that virtually parallel, but also interfere with, FELA. The UTPA requires self-insured railroad carriers "to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims *in which liability has become reasonably clear*." Section 33-18-201(6), MCA (emphasis added). Likewise, prior to claim settlement, and during the pendency of FELA claim litigation, the UTPA requires self-insured carriers to advance payments for an injured worker's medical expenses "for which liability has become reasonably clear," *Ridley*, 286 Mont. at 338, 951 P.2d at 994, and for other damages that "are not reasonably in dispute," such as "[l]ost wages which are reasonably certain," *DuBray v. Farmers Ins. Exchange*, 2001 MT 251, ¶¶ 14-15, 307 Mont. 134, 36 P.3d 897. Dannels' UTPA claims here are premised upon BNSF's alleged failure to settle his FELA claim promptly despite liability being reasonably clear and by declining to pay his lost wages prior to completion of the FELA litigation.

¶70 We have held that "reasonably clear" liability is not the same as "negligence." Liability is "reasonably clear when a reasonable person, with knowledge of the relevant facts and law, would conclude, for good reason, that the defendant is liable to the plaintiff." *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 39, 357 Mont. 293, 239 P.3d 904 (quotations omitted). This standard is expressly different than negligence:

> A finding of liability by a trier of fact under the preponderance of evidence standard in

> the negligence action does not necessarily imply that liability was reasonably clear when the [defendant] was adjusting the claim. Instead, reasonably clear liability is established when it is clear enough that reasonable people assessing the claim would agree on the issue of liability.

Peterson, ¶ 39 (quotations omitted).

¶71 Additionally, procedural remedies have been expanded under the UTPA. While the UTPA prohibits injured claimants from "fil[ing] an action under this section until after the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim," § 33-18-242(6)(b), MCA, declaratory actions to obtain advance payments by showing reasonable clear liability are nonetheless authorized, even during the pendency of the underlying action, requiring a carrier to litigate in two forums. *See High Country Paving, Inc. v. United Fire & Cas. Co.*, 2019 MT 297, ¶ 22, 398 Mont. 191, 454 P.3d 1210 (citing *Dubray*, ¶ 16); *Teeter v. Mid-Century Ins. Co*., 2017 MT 292, ¶ 18, 389 Mont. 407, 406 P.3d 464; *Safeco Ins. Co. v. Montana 8th Judicial Dist. Ct.*, 2000 MT 153, ¶ 20, 300 Mont. 123, 2 P.3d 834.

¶72 In contrast, FELA liability is a federal question resolved through principles of negligence and federal common law. *Consol. Rail Co. v. Gottshall*, 512 U.S. 532, 543, 114 S. Ct. 2396, 2404, 129 L.Ed.2d 427 (1994) (citing *Urie v. Thompson*, 337 U.S. 163, 182, 69 S. Ct. 1018, 1030-31, 93 L.Ed. 1282 (1949); *Ellis v. Union Pacific R. R. Co.*, 329 U.S. 649, 653, 67 S. Ct. 598, 600, 91 L.Ed. 572 (1947) (establishing that the basis of liability is the carrier's negligence, "not the fact that injuries occur"). Specifically, FELA rests on the "principle that compensation should be exacted

from the carrier where, *and only where*, the injury results from negligence imputable to it." *Winfield*, 244 U.S. at 150, 37 S. Ct. at 547-48 (emphasis added). "What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes." *Urie*, 337 U.S. at 174, 69 S. Ct. at 1027 (1949). "[N]o part [of FELA] points to any purpose to leave the States free to require compensation where the act withholds it." *Winfield*, 244 U.S. at 150, 37 S. Ct. at 548. Procedurally, any damages to be paid by a carrier for its negligence under FELA must be determined by a jury in federal litigation. *Bailey v. Central Vt. Ry*., 319 U.S. 350, 354, 63 S. Ct. 1062, 1064, 87 L.Ed. 1444 (1943).

¶73 Montana's UTPA imposes various additional duties upon a self-insured carrier, including to advance damage payments and to attempt to settle, upon "reasonably clear" liability, regardless of whether a carrier is ultimately determined to be negligent by a jury in FELA litigation. Conceivably, a carrier could be required to advance damage payments to a claimant in a declaratory action when liability is "reasonably clear," while ultimately obtaining a jury verdict in the FELA action that it was not negligent, a result incompatible with federal precedent. *See Winfield*, 244 U.S. at 150, 37 S. Ct. at 547-48. The UTPA requires carriers to fight liability in Montana on dual fronts and under dual standards, with one decision necessarily impacting its liability or standing in the other. A carrier is forced to choose between incompatible options: reserve negligence defenses for trial in the FELA action and invite UTPA claims for failure to settle or advance damage payments; or, advance damage payments and settle the FELA action to avoid

any UTPA claims without a jury determining negligence at trial, thus forfeiting any trial defenses.

¶74 The development of UTPA jurisprudence since *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, 312 Mont. 498, 60 P.3d 418, the different claim posture, and the different question and arguments raised here, require a different outcome. While the loss of state law remedies is an unfortunate outcome, I believe the contradictory nature of these schemes requires the conclusion that the UTPA claims Dannels has made are preempted by FELA as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67, 61 S. Ct. at 404 (footnote omitted). Concluding Dannels' particular UTPA claims are preempted, I would reserve judgment regarding the preemption of other potential UTPA claims until properly raised in future litigation.

Justice Beth Baker joins in the dissenting Opinion of Justice Rice.

APPENDIX B

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 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.

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

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 unjustifiably 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 R*eidelbach* 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 C

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

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

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)

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

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

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 Shewmake (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 reasonably 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); *Anderson 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 trying 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 D

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 E

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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.

Defendants 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 F

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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 Honorable JULIE MACEK **COMPLAINT AND JURY DEMAND** [Filed 09/10/14]

COMES NOW the plaintiff and hereby makes the following Complaint and request for a jury.

I. THE PARTIES

1. The plaintiff, Robert Dannels, is a citizen and resident of Montana. He was employed by the defendant, BNSF Railway Company ["BNSF"], and its predecessors in interest from approximately 1990 to 2010. Over this period, he worked throughout northern Montana, including within this Judicial District. On December 6, 2010, he filed a lawsuit in the Eighth Judicial District to recover damages for personal injuries negligently caused by BNSF during the course and scope of his employment. On February 13, 2013, a jury entered a verdict in favor of Mr. Dannels and against BNSF. Judgment on the verdict was filed on February 15, 2013.

2. The defendant, BNSF Railway Co. ["BNSF"], is a railroad company operating in interstate commerce. It has trackage, facilities and offices throughout Montana, including facilities and trackage within the Eighth Judicial District.

3. The defendant, BNSF Insurance Co., Ltd ["BNSF IC"], is a wholly owned subsidiary of the defendant, BNSF, which provides insurance coverage, including coverage for claims for damages made by injured BNSF workers, such as Mr. Dannels.

4. The defendant, Nancy Ahern, is a senior claims representative for BNSF in Montana. Ms. Ahern was engaged in investigating and adjusting Mr. Dannels' claims and participating in litigation strategies regarding Mr. Dannels' claims. Ms. Ahern is a citizen and resident of Montana.

5. John Doe defendants 1 through 10 are agents of the defendant, Burlington Northern, and/or defendant, BNSF IC, who participated in decisions regarding Mr. Dannels' claims, their adjustment and defense

strategies. Some of them reside and/or are citizens of Montana and some may be residents and/or citizens of other states. Some are within the chain of command of the defendant Ahern.

6. Jurisdiction in the state courts of Montana exists because diversity of citizenship between the plaintiff and defendants does not exist.

COUNT I

CLAIM AGAINST BNSF FOR BAD FAITH

7. BNSF hired Mr. Dannels in 1990. For the next 20 years, it negligently assigned him to physical work activities which carried a high risk of gradually injuring his spine and eventually leading to chronic pain and disability.

8. This gradual injury process is known as cumulative trauma. In Mr. Dannels' case, the hazards that caused cumulative trauma consisted of a combination of extremely heavy lifting and repetitive lifting often performed in awkward postures and on unstable walking surfaces. Examples included lifting kegs of spikes and other materials weighing up to 200 pounds; lifting and dragging railroad ties weighing over 200 pounds; lifting and pushing Nordberg grinders weighing over 300 pounds; lifting and carrying portions of steel rails which might weigh over a ton; and repetitively lifting and carrying a variety of equipment and material items weighing between 50 to 100 pounds. The hazards also included shock and vibration to the spine caused when operating poorly maintained vehicles having worn out seats and inadequate suspensions systems.

9. Mr. Dannels' low back and spine slowly degenerated over 20 years due to cumulative exposures to these workplace hazards. Because much of the

cumulative trauma process is subclinical, there were only minor intermittent aches and pains for most of this period. Over the last few years, the cumulative exposures caused Mr. Dannels' back to become weak and susceptible to permanent and disabling spinal injury even from relatively minor traumas.

10. Mr. Dannels was disabled by an event which occurred on March 17, 2010. BNSF had ordered him to use a Bobcat skidster to remove snow piles from a parking lot in its Havre, Montana railroad yard. Unknown to Mr. Dannels, BNSF had negligently concealed a rigid steel wellhead under the snow pile. When Mr. Dannels drove the bucket of the skidster into the snow pile, it collided with the concealed wellhead, injuring Mr. Dannels' back and spine which required medical care. He has not been able to return to productive employment. He continues to suffer pain and disability due to his work-related injury.

11. It is reasonably clear that BNSF is liable for the disabling back and spinal injuries Mr. Dannels sustained. As a legal matter, compensation is governed by the Federal Employers' Liability Act, 45 U.S.C §§ 51, *et. seq*. The FELA contains several provisions which create a high probability that injured workers will receive compensation for injuries in most cases. The FELA "is to be given a liberal construction in favor of railroad workers so that it may accomplish the humanitarian and remedial purposes intended by Congress." *Woods v. BNSF,* 2004 MT 332, ¶ 20. "The FELA imposes a high standard of care upon the carrier," including legal duties "to provide a safe workplace, to furnish employees with suitable equipment to enable the employee to perform work safely, to provide sufficient manpower to complete the work in a reasonably safe manner, and to assign workers to

jobs for which they are qualified and to avoid placing them into jobs beyond their physical capabilities." "This continuous duty to provide a safe place to work is broader than the general duty to use reasonable care." *Kalanick v. Burlington Northern,* 242 Mont. 45, 788 P.2d 901, 905-907 (1990).

"The employer is stripped of his common law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference." *Rogers v. Missouri Pac. R.R.,* 352 U. S. 500 (1957); *see also Ayers v. Norfolk & Western Ry.,* 538 U. S. 135 (2003); *CSX Transp. v. McBride,* 131 S. Ct. 2630 (2011).

The defendant is not entitled to apportion the injury to non-railroad causes. "To require apportionment would put that provision in tension with the rest of the statute. The Act expressly directs apportionment of responsibility between the employer and the employee based on comparative fault. The statute expressly prescribes no other apportionment." *Ayers, supra* at 538 U. S. 135 (2003). Arguments by railroads that the FELA "concerns only division of responsibility among multiple factors, and not causation more generally, misses the thrust of Supreme Court directives." *McBride, supra* at 2639. The "any part" test [of the FELA] is the "*single* inquiry in determining causation in FELA cases." *Id.*

12. Liability was and is reasonably clear in Mr. Dannels' case. A reasonable investigation based upon

all available information would have shown the requirements of the FELA had been satisfied and, therefore, damages were due. BNSF was negligent for injuring Mr. Dannels because it had knowledge the work tasks it assigned him carried a high risk for causing cumulative trauma injury. Both before and after hiring Mr. Dannels, BNSF received warnings from the Association of American Railroads ["AAR"] that track workers were suffering career-ending back injuries due to hazardous exposures to physical risks associated with their jobs. The AAR specifically stated that jobs such as lifting and carrying 200-pound spike kegs, ties and similar material and equipment were causing the spinal injuries and therefore, should not be assigned to track workers. Likewise, the shock and vibration from poorly designed or maintained track and construction vehicles were causing cumulative trauma injury. BNSF was warned that its workers would not realize their jobs were causing permanent injury because the progression to a painful injured condition would occur gradually over a number of years. When serious and long-lasting pain first manifested itself, it would be too late to prevent disability. BNSF knowingly overexposed Mr. Dannels to the physical work that causes cumulative injury to the spine. This eventually disabled him and has led to chronic pain.

13. In internal documents, BNSF acknowledged its workers were sustaining serious injuries because they were being overexposed to cumulative trauma risks. BNSF's safety expert characterized the risks as the "seven no-no's." They were causing a large percentage of BNSF's injuries. Because they were cumulative trauma injuries, the final event which precipitated disability was characterized as the "straw that broke the camel's back." Mr. Dannels was overexposed

to these "seven no-nos" over most of his 20-year career and was ultimately disabled by an event which might be characterized as the "straw that broke the camel's back."

14. BNSF's injury and claims records, both before and during Mr. Dannels' 20-year career, demonstrated BNSF trackmen were sustaining a high number of disabling cumulative trauma injuries due to exposures to risks similar to those BNSF exposed Mr. Dannels to. For many years, BNSF acknowledged liability by paying damages through settlements and verdicts in many cumulative trauma cases.

15. The medical literature has also been clear over Mr. Dannels' career that the types of stresses in his workplace carried a high risk of eventually disabling him. BNSF is charged with knowledge of this information.

16. It is also reasonably clear BNSF was liable for negligently causing the collision with the wellhead in March 2010. It was aware that other BNSF workers had struck concealed hazards buried under snow and therefore, it was necessary to remove hazards or flag them with a warning, if the hazards were to be concealed. It did neither in Mr. Dannels' situation. It also failed to train its workers who had plowed the snow to avoid covering hazards or to at least put up a warning flag or cone if they did conceal something that could cause a collision. Again, BNSF did neither in Mr. Dannels' case. Furthermore, BNSF had equipped some of its loaders with shoulder harnesses so if the operator struck something, his or her spine would be protected. BNSF, however, failed to install a shoulder harness in Mr. Dannels' bobcat loader. This caused the collision and injury at least in part and

therefore, under the standards of the FELA, BNSF would be held liable.

17. Therefore, a reasonable investigation based upon all available information by BNSF early on would have revealed it was liable for the injuries Mr. Dannels sustained. Under this situation, both BNSF and its claims personnel assigned to Montana had legal duties to resolve claims fairly and in good faith. This duty is imposed against both BNSF and its claims personnel through Montana common law and statutory law at §§ 33-18-201, *et.* seq., MCA; *Reidelbach v. Burlington Northern and Santa Fe Ry. Co.,* 2002 MT 289; *O'Fallon v. Farmers Ins. Exch.,* 260 Mont. 233, 859 P.2d 1008 (1993). The common law and statutory duties owed Mr. Dannels include:

- to promptly respond to Mr. Dannels' communications with respect to his claim;
- to adopt and implement reasonable standards for the prompt investigation of his claims;
- to promptly pay his claims after conducting a reasonable investigation based upon all available information;
- to attempt in good faith to effectuate prompt, fair and equitable settlement of his claims in which liability has become reasonably clear, including paying injury-related expenses and lost wages as they occurred;
- to make a reasonable offer to settle so Mr. Dannels would not be compelled to file an expensive, time-consuming and stressful lawsuit to recover damages for his injuries;

- to provide a reasonable explanation for the denial of his claims or for the failure to offer a compromise settlement; and
- to avoid attempting to influence a settlement by refusing to pay wage losses and similar losses which are reasonably clear.

The practices the defendants employed against Mr. Dannels, however, violated these duties.

18. Because of Mr. Dannels' injuries, BNSF discontinued his employment in May 2010, two months after he was injured and thus, ended Mr. Dannels' work activities which were engaged in interstate commerce. At that point, its common law and statutory duties with regard to settlement of claims commenced. This included its duty to promptly pay Mr. Dannels' lost wages since liability was reasonably clear. *Ridley v. Guarantee Ins. Co.,* 286 Mont. 325, 951 P.2d 987 (1997). BNSF, however, breached this duty by failing and refusing to do so. It continued to refuse to pay his wages even after a jury determined BNSF was negligent in causing the loss and a judgment was entered thereon. This refusal to pay lasted for almost three years and caused Mr. Dannels considerable and severe mental distress.

19. With nothing being done by BNSF, Mr. Dannels sought legal assistance in the early fall of 2010. BNSF was then contacted to see if it wanted to discuss the best way to proceed. BNSF was not responsive and suit was then filed on December 10, 2010.

20. The litigation would extend for another two years. BNSF's medical consultant admitted Mr. Dannels was injured by the collision with the pipe, but

BNSF still failed to pay any of his lost wages. BNSF was notified that Mr. Dannels was having a difficult time financially. Requests were made that BNSF consider providing him with a temporary job within the limitations of his injuries to alleviate his financial worries. BNSF failed to respond. The Court ordered that the parties engage in settlement mediation. BNSF's offer at the conference was a small fraction of Mr. Dannels' reasonable damages. BNSF refused to negotiate further or to accept the reasonable offer made by Mr. Dannels. BNSF contended it could rehabilitate Mr. Dannels, but refused to agree that if the rehabilitation were unsuccessful, Mr. Dannels would have a right to have his true damages determined by a jury. Because BNSF continued to violate its duty to effectuate a prompt, fair and equitable settlement, the resolution of Mr. Dannels' claims has been delayed for years, causing additional mental distress and expenses.

21. Jury trial was set for February 4, 2013. Mr. Dannels continued to attempt to fairly resolve his claims, but BNSF continued to refuse to engage in reasonable settlement negotiations in violation of its duties under Montana law.

22. The jury determined BNSF had negligently caused Mr. Dannels' injuries. It found Mr. Dannels was not negligent in causing any of his injuries. It awarded damages in the amount of $1.7 million. Judgment for this amount was entered on February 15, 2013. BNSF's motion for a new trial was denied.

23. After the verdict and judgment, Mr. Dannels made a written request to BNSF claims representative Nancy Ahern for BNSF to pay the lost wages which were due. He explained this was required under Montana law. BNSF refused.

24. Rather than pay clearly due losses of earnings, BNSF chose to leverage Mr. Dannels' claims for lost wages and retirement benefits against his claims for damages under the FELA. Leveraging claims in this manner is a direct violation of the duty of good faith in claims settlement practices as required by Montana law under both the statute and case law. *See Ridley, supra.* Specifically, just before suit was filed, BNSF offered to admit that Mr. Dannels was eligible for railroad retirement benefits and would submit paperwork to the retirement board to that effect, but only if Mr. Dannels would settle all of his FELA claims for a small proportion of the damages which were reasonably due him. Mr. Dannels refused to submit to this illegal leveraging. BNSF's tactic caused additional and unnecessary emotional distress and hardships.

25. After the jury returned a verdict showing Mr. Dannels was eligible for railroad disability, Mr. Dannels sent a written request to BNSF asking that it acknowledge this fact and so notify the retirement board so Mr. Dannels could commence receiving the disability benefits which were clearly due him and his distress could be alleviated. BNSF refused and thereby further acted in bad faith in violation of its statutory and common law duties, causing further emotional distress and hardships for Mr. Dannels. *See* letters, Attachments 1 and 2.

26. BNSF also violated its common law and statutory duties under § 33-18- 201(3), MCA, which require it to "adopt and implement reasonable standards for the prompt investigation of claims." Rather than employ reasonable standards, BNSF implemented standards designed to evade liability and inflict additional injury and stress upon Mr. Dannels.

27. As a result of BNSF's multiple and intentional violations of its common law and statutory duties of good faith and fair dealing regarding claims, *supra,* Mr. Dannels suffered mental distress and expenses, and his right to damages was delayed for years. Therefore, BNSF is liable for all damages allowed by law caused thereby.

COUNT II

CLAIM FOR PUNITIVE DAMAGES AGAINST BNSF

28. The plaintiff repleads all that is stated above and for his next claim against defendant BNSF hereby alleges and states:

29. BNSF's practices against Mr. Dannels constitute actual fraud and malice as defined under § 27-1-221, MCA, and therefore, it is subject to punitive damages under § 27-1-220, MCA. BNSF has routinely instigated these same illegal and deceitful settlement practices against other injured workers in order to pressure them into compromising their claims for less than reasonable damages.

30. The illegal acts and omissions of the defendant are undertaken as a regular course of conduct against Montana railroad workers in general and are motivated to discourage claims and to avoid accountability for paying full damages.

31. The plaintiff, therefore, requests that the jury award reasonable punitive damages in order to punish and deter the defendant, BNSF, from engaging in this type of conduct to the detriment of the people it has wrongfully harmed.

COUNT III

CLAIM AGAINST BNSF ADJUSTER AHERN

32. The plaintiff repleads and incorporates all that is alleged above and for his claim against the defendant, Nancy Ahern, hereby alleges and states as follows:

33. The defendant, Nancy Ahern, is a senior claims representative of the BNSF. Her job duties include investigating, adjusting and settling claims made by injured BNSF railroad workers in Montana. She also assists in carrying out litigation strategies against Montana BNSF workers. She has 20 years of experience working for BNSF as a claims representative in Montana. She is charged with knowledge of Montana law, including her obligations to implement and carry out investigations and settlement practices in good faith in order to effectuate prompt, fair and equitable settlement of claims and to avoid conduct which causes delay, unnecessary hardships, mental distress and expenses. The obligation of a person involved in the investigation and adjustment of claims to follow this law has long been recognized in Montana both under statute and court decisions. *See O'Fallon v. Farmers Ins. Exch., supra; Reidelbach, supra.*

34. The defendant Ahern was the BNSF claims adjuster assigned to Mr. Dannels' claims. She violated several of her legal duties. She knew or should have known liability was reasonably clear, given her experience in these matters for close to 20 years and her duty to conduct a prompt and reasonable investigation based upon all available information. She did not respond to inquiries from Mr. Dannels. She made no effort to promptly and fairly investigate and pay his claim. She made no effort to pay Mr. Dannels' lost

wages after BNSF dismissed him in May 2010. She performed a superficial investigation designed to exonerate BNSF and shift the blame onto Mr. Dannels. After Mr. Dannels retained counsel, she failed to respond to Mr. Dannels' request to discuss the claim.

35. After suit was filed, defendant Ahern took steps to impede Mr. Dannels' investigation. Among other things, she sent a certified letter to Mr. Dannels' attorney forbidding him from "communicat[ing] or encourag[ing] others to communicate about the [claim] with any other BNSF employees." Mr. Dannels and his counsel, however, have a legal right to communicate with BNSF employees concerning FELA claims. She was BNSF's representative at the court-ordered mediation, but refused to make a reasonable offer or to engage in reasonable settlement negotiations. She attended the trial and heard the evidence and verdict. She was requested after the judgment to have Mr. Dannels' lost wages paid as required by Montana law, but refused.

36. Defendant Ahern's violation of her legal investigatory and settlement duties as set forth above caused Mr. Dannels to suffer mental distress and expenses.

COUNT IV

CLAIM AGAINST JOHN DOES 1 THROUGH 10

37. The plaintiff repleads and incorporates all that is alleged above and for his claim against John Does 1 through 10 hereby alleges and states:

38. As stated above John Does 1 through 10 are other BNSF agents who participated in the acts and omissions taken against Mr. Dannels in connection with his claims. This includes, but is not limited to defendant Nancy Ahern's supervisors, some of whom

resided in Montana and some of who do not. Like all agents and claims personnel, who engage in claims practices in Montana, they are subject to Montana laws requiring the prompt and fair investigation and resolution of claims.

39. Rather than adopt and implement adjustment and settlement procedures designed to bring about the prompt and fair resolution of claims when liability was reasonably clear, the John Does 1 through 10 implemented claims procedures against Mr. Dannels designed to discourage and pressure him into an unfair settlement. This included refusing to engage in any meaningful settlement discussions even though Mr. Dannels' claim was reasonably clear. As a result, Mr. Dannels suffered mental distress, unnecessary delay and expenses.

COUNT V

CLAIM AGAINST BNSF INSURANCE COMPANY

40. The plaintiff repleads and realleges all that is stated above and for his first claim against BNSF Insurance Company hereby alleges and states:

41. As an insurance company and "person" involved in the business of insurance and adjusting claims in Montana, the defendant BNSF IC owes claimants the duty to handle their claims fairly, promptly and in good faith. BNSF IC is subject to the statutory and common law duties and obligations set forth in Montana's Unfair Claims Settlement Practices Act at § 33-18-201, MCA *et. seq.*

42. BNSF IC violated its duties to fairly settle Mr. Dannels' claims. It was a participant in and responsible for unfair practices employed against Mr. Dannels which are set forth above. Liability was reasonably

clear as explained above. Mr. Dannels' claim should have been resolved promptly and fairly without causing unnecessary mental stress, delay and expenses. Had BNSF IC complied with its obligations of good faith, Mr. Dannels would not have suffered these damages.

43. BNSF IC failed to adopt and implement reasonable standards for investigating and settling Mr. Dannels' claim and therefore, violated Montana's Unfair Settlement Practices Act in this regard as well. Had BNSF IC adopted reasonable. standards, Mr. Dannels' claim would have been promptly resolved for reasonable compensation rather than being dragged out for several years with the result that Mr. Dannels unnecessarily suffered mental distress and other damages.

44. The illegal acts and omissions of the defendant are undertaken as a regular course of conduct against Montana railroad workers in general and are motivated to discourage claims and to avoid accountability for paying full damages.

COUNT VI

PUNITIVE DAMAGE CLAIM AGAINST BNSF INSURANCE COMPANY

45. The plaintiff repleads and realleges all that is stated above and for his next claim against BNSF IC hereby alleges and states:

46. BNSF IC's practices against Mr. Dannels constitute actual fraud and malice as defined under § 27-1-221, MCA, and therefore it is subject to punitive damages under § 27-1-220, MCA.. Employing unfair settlement practices is a course of conduct the defendant has employed in Montana.

47. The plaintiff, therefore, requests that the jury award reasonable punitive damages in order to punish and deter the defendant BNSF IC from engaging in this type of conduct to the detriment of Montanans harmed by its wrongful conduct.

COUNT VII

MENTAL DISTRESS CLAIMS AGAINST ALL DEFENDANTS

48. The plaintiff repleads and realleges all that is stated above and for his next claim against all defendants hereby alleges and states as follows:

49. By their illegal acts and omissions as set forth above the defendants singularly and together inflicted severe mental distress on Mr. Dannels. This was intentional and designed to discourage Mr. Dannels from continuing to pursue his claims. It was deliberately designed to deter other injured workers from pursuing claims against BNSF for work-related injuries. In the alternative, the acts and omissions constituted negligence, gross negligence and recklessness.

50. Under Montana law, it is illegal to intentionally or negligently inflict severe mental distress on a person and therefore, the defendants are legally liable for inflicting this injury upon Mr. Dannels.

REMEDY REQUESTED

Based upon the above, Mr. Dannels requests a jury and the Court award all damages which are reasonable and legal under the circumstances, including but not limited to the following:

(1) Against all defendants: All damages allowed by law for violating Montana's common and statutory laws prohibiting unfair, bad faith investigation and settlement practices and for inflicting mental distress,

including damages for delay, mental distress, interest and other expenses.

(2) Against defendant BNSF and BNSF Insurance Company: Punitive damages for the purpose of punishing and deterring these defendants from continuing to engage in malicious and fraudulent acts in violation of Montana's law to the detriment of Montana injured railroad workers.

(3) Any and all other damages deemed legal and appropriate under the circumstances, including attorney fees and costs.

DATED this 31st day of December, 2013.

THUESON LAW OFFICE

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APPENDIX G

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Attorney for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT CASCADE COUNTY

ROBERT DANNELS, Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware corporation, Defendants.	Cause No. BDV-10-1119 Honorable Julie Macek Kenneth R. Nell **COMPLAINT AND JURY DEMAND** [Filed: December 6, 2010]

COME NOW the plaintiff, Robert Dannels, and hereby makes the following complaint and requests a jury:

I. JURISDICTION AND VENUE

1. Robert Dannels has worked for the defendant BNSF Railway Company since 1990. He has worked for the BNSF Railway Company and its predecessors

in interest in various locations throughout Montana. He is a citizen and resident of Montana.

2. The defendant BNSF Railway Company is a corporation with a residency and place of business other than Montana. Its business is operating a railway company in interstate commerce.

3. Venue and jurisdiction are appropriate in the Eighth Judicial District of the State of Montana. As set forth in his claim below, the plaintiff is making a personal injury claim for being injured in his railroad workplace within the State of Montana. Under the Federal Employers' Liability Act (FELA) and state law, venue and jurisdiction are proper within this county.

II. CLAIM FOR ACUTE INJURY

The plaintiff repleads all that is stated above and for his next claim hereby alleges and states:

1. On or about March 17, 2010 at 9:00 AM, the plaintiff Robert Dannels was operating heavy equipment for the BNSF in the railroad yard at Havre, Montana. His job was to remove snow from the Havre yard with a "skidster," which is similar to a Bobcat loader. Other BNSF personnel had piled snow up, concealing a top of a metal well head.

2. Performing his job in the way he had been taught, Mr. Dannels attempted to scoop up the snow. The bucket on his skidster struck the concealed well head causing Mr. Dannels to be violently thrown around the cab of his skidster, which injured his spine.

3. The defendant BNSF Railway Company negligently caused the collision by providing an unsafe work method, an unsafe workplace and through other unreasonable acts and omissions. It

had knowledge of the hazards; it was negligent for BNSF to pile snow over the well head, knowing that other personnel, including Mr. Dannels, would be attempting to remove the snow.

4. Under the FELA, 45 U.S.C. § 51, et. seq., a railroad company which negligently causes injury to one of its workers is responsible for damages resulting therefrom. Mr. Dannels' spine was injured by the collision with the well head, causing him pain and disability. He, therefore, requests that a court and jury award all damages appropriate under the circumstances.

III. CLAIM FOR CUMULATIVE TRAUMA

The plaintiff repleads all that is stated above and for his next claim hereby alleges and states:

1. Mr. Dannels' spine had already been weakened by pre-existing injuries negligently caused by the defendant over his 20-year career. The defendant's negligence consisted of having Mr. Dannels perform unreasonably unsafe work, carrying extremely heavy material and equipment, such as 200-pound spike kegs, 200+ pound ties, working with awkward and heavy hydraulic equipment which can weigh over 80 pounds and working with inadequate manpower. The railroad also failed to provide Mr. Dannels with a safe workplace and safe working methods when he worked both as a machine operator (heavy equipment operator) and also as a maintenance of way track worker. This included, but was not limited to, assignment to poorly maintained heavy equipment with inadequate seating, obsessive shock and vibration and work activities which would increase shock and vibration. It also included other unsafe work

activities which were routine for maintenance of way workers during the 1990s to the current date.

2. As a result of the defendant's negligence set forth above, Mr. Dannels' spine was injured and weakened, making him more susceptible to injury when he was acutely injured in March 2010 and on other occasions when he experienced back pain on the job. In addition, the defendant is also legally responsible for the pre-existing condition itself, including any pain and disability resulting therefrom.

3. The plaintiff, therefore, requests that the Court and jury award all damages which are appropriate for the injuries occurring on March 17, 2010 and for the damages caused by the pre-existing condition.

DATED this 2nd day of December , 2010

THUESON LAW OFFICE

/s/ Erik B. Thueson

ERIK B. THUESON
P.O. Box 280
Helena, MT 59624-0280

APPENDIX H

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.