

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

JACKSON WELLS, as Personal Representative for the Estate of THOMAS E. WELLS, deceased; and JUDITH HEMPHILL, as Personal Representative for the Estate of JOYCE H. WALDER, deceased,

Plaintiffs,

vs.

BNSF RAILWAY COMPANY, a Delaware corporation, ROBINSON INSULATION COMPANY, a Montana Corporation for profit, GROGAN ROBINSON LUMBER COMPANY, a Montana Corporation for profit, et al.,

Defendants.

CV-21-97-GF-BMM

ORDER

INTRODUCTION

Plaintiffs Jackson Wells, as personal representative for the estate of Thomas Wells (“Wells”), and Judith Hemphill, as personal representative for the estate of Joyce Walder (“Walder”) (collectively, “Plaintiffs”), have sued Burlington Northern Santa Fe Railway Company (“BNSF”), along with other defendants, for negligence,

strict liability, wrongful death, and punitive damages. (Doc. 1.) This suit arises from Wells's and Walder's deaths from asbestos exposure-caused mesothelioma. (Doc. 15 at 2.) Plaintiffs allege that Wells and Walder were exposed to airborne amphibole asbestos dust at the BNSF railyard in Libby. (*Id.*) Plaintiffs allege that these exposures caused Wells's and Walder's mesotheliomas and deaths. (Doc. 1.) The parties each have filed several motions in limine. (Doc. 106); (Doc. 123); (Doc. 141); (Doc. 143.)

LEGAL STANDARD

Parties may use motions in limine to preclude prejudicial or objectionable evidence before it is presented to the jury. The decision on a motion in limine is committed to the district court's discretion—including the decision of whether to rule before trial at all. *United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999). A motion in limine “should not be used to resolve factual disputes or weigh evidence.” *BNSF R.R. v. Quad City Testing Lab., Inc.*, 2010 WL 4337827, at *1 (D. Mont. 2010). The Court shall exclude in limine evidence only when the moving party demonstrates the evidence's inadmissibility on all potential grounds. *See, e.g., Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004).

A court should defer evidentiary rulings until trial unless evidence meets this high standard. This approach allows resolution of questions of foundation, relevancy, and potential prejudice in the proper context. *Quad City Testing Lab.*,

2010 WL 4337827 at *1. “Although rulings on motions *in limine* may save time, costs, effort and preparation, a court is almost always better situated during the actual trial to assess the value and utility of evidence.” *Id.* Rulings on motions in limine are provisional and a trial court always may change its mind during the course of trial. *Luce v. United States*, 469 U.S. 38, 41 (1984); *see Agan v. BNSF Ry. Co.*, 2022 WL 3700052, at *1 (D. Mont. Aug. 26, 2022).

DISCUSSION

I. BNSF’s Motions in Limine

A. BNSF’s Motion in Limine Regarding Predecessor Railroad Knowledge of Asbestos (Doc. 106)

BNSF moves the Court to exclude “testimony, documentary evidence, arguments, opinions, and/or references to evidence regarding predecessor railroad knowledge of asbestos in any matter whatsoever at trial, directly or indirectly.” (Doc. 106 at 2.) BNSF anticipates that Plaintiffs may attempt to introduce evidence that BNSF’s predecessor railroads knew of the dangers of asbestos, thereby imputing this knowledge to BNSF. (*Id.* at 3-4.) BNSF identifies a specific source of this information, the Alton Railroad documents, that contain explicit warnings of the occupational hazards of asbestos exposure. (*Id.* at 4.) BNSF asks the Court to prevent Plaintiffs from arguing that the jury should impute this knowledge onto BNSF. (*Id.* at 4-5.)

BNSF acknowledges that Montana trial courts previously have denied similar motions, but BNSF contends that, in those cases, the courts nevertheless required the plaintiffs to authenticate and lay proper foundation for admission of the Alton Railroad documents. The Court will deny BNSF's Motion, but it will require Plaintiffs to remain in compliance with any applicable requirements set forth in the Federal Rules of Evidence. The Court agrees with other Montana state courts that have determined, for example, that "[t]he [evidence at issue here, including the Alton] documents go towards illustrating the state of knowledge of numerous other railroads (if not that of Burlington's predecessor) concerning asbestos during the 1930s and are thus relevant to the appropriate standard of care. Whether BNSF had actual or constructive knowledge of the hazards of asbestos is a jury question." *Daley v. Burlington Northern Santa Fe Ry. Co.*, No. DV-05-882(C), 2017 WL 10662052, at *5 (Mont. Dist. June 01, 2017).

B. BNSF's Motion in Limine on Various Evidentiary Issues (Doc. 123)

BNSF asks the Court for preliminary rulings on the scope of certain testimony, the exclusion of certain evidence, and the limitations of certain arguments, among other issues. (Doc. 124.) The Court grants, in part, denies, in part, and defers ruling, in part, on BNSF's Motion.

1) Lay witness testimony

BNSF argues that the Court should prohibit Plaintiffs from eliciting testimony from lay witnesses regarding the composition of materials to which Plaintiffs allege exposure on BNSF's Libby properties. (*Id.* at 6.) Plaintiffs represent that they do intend to offer substantial lay witness testimony regarding the asbestos content of these materials. (Doc. 168 at 8-9.) Plaintiffs maintain, however, that Federal Rules of Civil Procedure 601 and 701 allow lay witness testimony regarding personal knowledge, observations, and opinions rationally related to the witness's perceptions: "[P]ersonal knowledge includes opinions and inferences grounded in observations and experience." (Doc. 168 at 9) (citing *United States v. Whittemore*, 776 F.3d 1074, 1082 (9th Cir. 2015) (quoting *Great Am. Assurance Co. v. Liberty Surplus Ins. Corp.*, 669 F.Supp.2d 1084, 1089 (N.D. Cal. 2009))). The Court will deny BNSF's Motion subject to renewal at trial.

2) Evidence or references to alleged ban on asbestos

BNSF asks the Court to exclude evidence of the Environmental Protection Agency's (the "EPA") hearings on asbestos and any insinuation that the EPA has banned products containing asbestos. (Doc. 124 at 6.) Plaintiffs point out, however, that BNSF has provided no specific description of the hearings or testimony it believes will be at issue. (Doc. 168 at 10.) The Court will defer its ruling until it better understands the specific evidence at issue and the proffered purpose for its admission.

3) Evidence of other vermiculite industrial exfoliation activities around the country

BNSF asks the Court to exclude Plaintiffs' testimony and evidence of other industrial exfoliation operations across the county. (Doc. 124 at 7.) BNSF argues that this evidence is irrelevant to Plaintiffs' alleged exposures during their time in Libby. (*Id.*) Plaintiffs stipulate to the Motion to the extent these operations prove unrelated to operations or activities involving vermiculite sourced from Libby. (Doc. 168 at 10.) Plaintiffs assert, however, that these other activities remain relevant to their claims because the Libby mine produced eighty percent of the world's supply of vermiculite. Shipment of this vermiculite required railcars, including BNSF's. The Court will defer its ruling on BNSF's Motion until trial. The Court will require BNSF to identify the specific activities it seeks to exclude. The Court will rule on the admissibility of each activity individually at time of trial.

4) Evidence of nonparties' claims or diseases and 5) Evidence of nonparty illnesses

BNSF asks the Court to exclude testimony and evidence of nonparties' claims or diseases. BNSF argues that this evidence fails the substantial similarity test, remains irrelevant, and proves unfairly prejudicial. (Doc. 124 at 7-8.) BNSF also seeks to exclude statistical evidence of any nonparty's illnesses. (*Id.* at 8-9.) BNSF contends that Plaintiffs may attempt to admit statistical evidence of nonparties' alleged asbestos-related illnesses or diseases in the Libby area, thereby opening the door to the jury's consideration of irrelevant and prejudicial information. (*Id.*)

Plaintiffs counter that potential corroborating testimony by former or current Libby residents regarding their experiences of asbestos exposure in and around BNSF properties remains relevant to Plaintiffs' claimed substantially similar exposures. (Doc. 168 at 10-11.) The Court agrees with BNSF that the existence of independent claims against BNSF and evidence that nonparties suffered some asbestos-related diseases, standing alone, likely proves irrelevant to the elements Plaintiffs must prove to prevail on their claims. The Court will defer its ruling on this Motion in Limine, however, until the time of trial. The Court will require Plaintiffs and BNSF to identify the specific testimony or other incidents they seek to admit or exclude, respectively. The Court directs the parties to raise these issues outside the presence of the jury. The Court will rule on the admissibility of each individually.

6) BNSF's failure to call certain witnesses

BNSF anticipates that Plaintiffs may attempt to argue that BNSF, though it possessed the ability to call certain witnesses, failed to so do. (Doc. 124 at 11.) BNSF asks the Court to prevent Plaintiffs from discussing or arguing that BNSF failed to call such witnesses. (*Id.* at 10-11.) BNSF does not identify any potential witnesses who may fall in this category or the nature of their anticipated testimony. The Court will deny BNSF's Motion in the absence of any specific witnesses or evidence. BNSF may renew its Motion at the time of trial.

7) Subsequent remedial measures

BNSF asks the Court to exclude evidence related to the remediation of BNSF's Libby property as evidence of subsequent remedial measures. (Doc. 124 at 11-13) (citing Fed. R. Evid. 407)). BNSF argues that it voluntarily undertook its Libby cleanup when it entered an Administrative Order on Consent ("AOC") with the EPA, rendering evidence of its actions inadmissible under Federal Rule of Evidence 407. (*Id.* at 12-13.) BNSF also argues that this evidence likely remains irrelevant to the issues at trial and, even if relevant, unfairly prejudicial. (*Id.* at 13-16.)

Federal Rule of Evidence 407 excludes evidence of subsequent remedial measures if offered to prove negligence or culpable conduct, among other prohibitions. Fed. R. Evid. 407. Rule 407 only applies, however, "to a defendant's voluntary actions." *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 888 (9th Cir. 1991). BNSF's decision to enter into the Administrative Order of Consent, though not compelled by a judicial action, cannot be deemed entirely voluntary. The EPA had taken action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to address BNSF's CERCLA liability. *See* 42 U.S.C. §§ 9601, 9604, 9606(a), 9607, 9622. BNSF's AOC requires it to perform certain cleanup at the Libby railyard: "the removal action required by [the AOC] is necessary to protect the public health, welfare, or the environment." (Doc. 143-1 at

8.) The Court tends to agree with Plaintiffs that evidence of BNSF's cleanup actions taken pursuant to the EPA AOC fall outside of Federal Rule of Evidence 407's ambit.

The Court also notes that Plaintiffs have identified several other purposes for seeking introduction of the evidence BNSF's Motion implicates, including evidence of soil and air testing completed to determine whether remediation proved necessary and as impeachment evidence offered to contradict BNSF's assertion that its Libby railyard never operated as a source of asbestos contamination. (Doc. 142 at 21.) The Court tends to agree that, generally, “‘subsequent remedial measures’ include ‘only the actual remedial measures themselves and not the initial steps toward ascertaining whether any remedial measures are called for.’” *In re Aircrash in Bali*, 871 F.2d 812, 816 n.2 (9th Cir. 1989) (citing *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482, 487 (N.D. Cal. 1988); *Rocky Mountain Helicopters v. Bell Helicopters Textron*, 805 F.2d 907, 918 (10th Cir. 1986)).

The Court nevertheless will defer its ruling until time of trial. The Court directs the parties, outside the presence of the jury, to identify the specific portions of the AOC and/or specific cleanup actions each seeks to either admit or exclude. The Court will address each individually and entertain objections specific to each piece of proffered evidence.

8) Inadmissible testing documents

BNSF asks the Court to exclude two documents reflecting air and soil sampling performed in Libby. (Doc. 124 at 16.) BNSF asserts that the air sampling data from 1975 and soil testing from a 2003 EPA initial pollution report lack foundation and constitute hearsay. (*Id.*) Plaintiffs oppose to this Motion, arguing that BNSF did not object to these documents within thirty days of production, and, therefore, has waived any objections regarding authenticity. (Doc. 168 at 17.) Plaintiffs ignore, however, that BNSF seeks to exclude this evidence for independent reasons, including its potential irrelevance and prejudice. (Doc. 124 at 17-18.) The Court nevertheless will deny the Motion. BNSF has not yet established that the evidence proves irrelevant to the issue central to this case: the presence and concentrations of asbestos in Libby and at the railyard. The Court will allow Plaintiffs to seek admission of this evidence subject to the constraints of the Federal Rules of Evidence. BNSF may renew its Motion, as well as raise specific objections, at trial.

9) Plaintiffs' spoliation of evidence

BNSF asks the Court to exclude at trial evidence of Walder's interview with Dr. Julie Hart, or any reliance on this interview. (Doc. 124 at 19.) BNSF also seeks an adverse inference instruction. (*Id.* at 18-19.) BNSF asserts that Plaintiffs' counsel failed to notify BNSF of Walder's mesothelioma diagnosis and failed to provide BNSF with the opportunity to conduct a perpetuation deposition before she died.

(*Id.*) BNSF alleges that Plaintiffs' counsel arranged instead to interview Walder with their own expert, Dr. Hart. (*Id.*) Dr. Hart incorporated her interview of Walder into her expert report. (*Id.* at 19.)

BNSF further moves for an adverse instruction because Plaintiffs' counsel failed to inform BNSF that Walder had contracted mesothelioma, denying BNSF the ability to conduct a perpetuation deposition of Walder before her death. (*Id.* at 20.) BNSF argues that this spoliation creates enormous prejudice against BNSF, because BNSF lost its opportunity to cross-examine Walder regarding her claims in this lawsuit including, but not limited to, home exposures or property contamination. (*Id.*)

BNSF also moves the Court for an adverse instruction regarding Plaintiffs' failure to preserve lung tissue of Wells after he died and was cremated. (*Id.* at 21.) BNSF asserts that Plaintiffs' counsel understood the value of the lung tissue because Plaintiffs' counsel previously retained an expert to examine Walder's lung tissue. Despite this knowledge, BNSF contends, Plaintiffs' counsel denied BNSF its only opportunity to determine whether Libby amphibole asbestos existed in Wells's lungs. (*Id.* at 22.)

Spoliation represents the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Compass Bank v. Morris Cerullo World*

Evangelism, 104 F. Supp. 3d 1040, 1051-52 (S.D. Cal. 2015). The Ninth Circuit has not established a “precise standard for determining when spoliation sanctions” become appropriate” *Reinert v. Tucker*, 2018 WL 2120904, at *2 (D. Mont. May 8, 2018). Trial courts generally require proof of the following: 1) the party controlling the evidence possessed an obligation to preserve it at the time the evidence was despoiled”; 2) the despoiling party destroyed the records or evidence with a “culpable state of mind”; and 3) the evidence proved relevant to the opposing party’s “claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 888 F. Supp. 2d 976, 989-90 (N.D. Cal. 2012); *see also Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). The party seeking spoliation sanctions bears the burden of establishing each element. *Apple*, 888 F. Supp. 2d at 989-90. BNSF’s intimation that Plaintiffs denied BNSF access to Walder while making her available to Plaintiffs’ expert does not appear substantiated by any evidence. Awaiting a confirmed diagnosis to legally proceed does not equate to a “culpable state of mind.”

State law determines when a party retains a duty to preserve outcome-determinative evidence in a diversity action. *See, e.g., Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804, 806 (7th Cir. 1995). Montana law dictates that a duty to preserve evidence such as Wells’s lung tissue may arise should BNSF satisfy the following elements: “1) the spoliator voluntarily undertakes to preserve the evidence and a

person reasonably relies on it to his detriment; [2] the spoliator entered into an agreement to preserve the evidence; [3] there has been a specific request to the spoliator to preserve the evidence; or [4] there is a duty to do so based upon a contract, statute, regulation, or some other special circumstance/relationship.” *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 20 (Mont. 1999). No evidence exists to support these elements in this case. The only avenue likely to trigger Plaintiffs’ duty to preserve would flow from “a specific request to the spoliator to preserve the evidence.” Plaintiffs contend that “slides of [Wells’s] available tissues were readily available” and that “BNSF could have requested the tissue from [] Wells’s medical provider, obviating the need [for an] autopsy.” The record does not reveal that BNSF made such a request.

The Court nevertheless will defer its ruling until time of trial. The Court will provide the parties an opportunity to argue this Motion and develop the record outside the presence of the jury.

II. Plaintiffs’ Motions in Limine

A. Plaintiffs’ Case Specific Motions in Limine (Doc. 141)

Plaintiffs seek in limine rulings on several categories of evidence they identify as specific to the facts of this case. (Doc. 142.) The Court grants, in part, denies, in part, and defers ruling, in part, on Plaintiffs’ Motions.

1) Evidence that BNSF is a “good corporate citizen”

Plaintiffs ask the Court to exclude, for example, evidence that BNSF is a “good” or “benevolent company that benefits the Libby community” as well as evidence of BNSF’s corporate ownership. (Doc. 142 at 9.) Plaintiffs argue that such evidence would prove prejudicial and irrelevant to the case. (*Id.* at 9-10.) BNSF represents that it does not intend to introduce evidence regarding its corporate ownership, but it argues that evidence of its company practices and industry standards remain relevant to the issue of negligence. The Court agrees. The Court will exclude evidence of BNSF’s role as a “good” company, but evidence of BNSF’s operations remains relevant to the case. The Court will deny Plaintiffs Motion subject to renewal at trial.

2) Evidence regarding the liability of nonparties

Plaintiffs ask the Court to exclude any reference to, or evidence of, the purported liability of nonparties to this action. (*Id.* at 11.) The Court has addressed by separate Order the availability of nonparty defenses. The Court will not repeat here its conclusions. The Court will defer until time of trial, however, the contours of its limitations on evidence regarding W.R. Grace. The Court does not intend to exclude all evidence of W.R. Grace and its Libby operations. The Court will allow the parties pretrial argument on the proper scope of this evidence. The Court directs the parties to identify outside the presence of the jury the specific evidence they seek to admit or exclude. The Court will address individually each proffer.

3) Evidence regarding union leaders' alleged knowledge of asbestos and/or hazardous exposures at the W.R. Grace mine

Plaintiffs ask the Court to exclude BNSF's referring to the alleged knowledge of union leaders regarding the presence of asbestos at the W.R. Grace mine and/or the hazards of asbestos exposure. (*Id.* at 15.) Plaintiffs argue that admission such evidence would require BNSF first to offer evidence sufficient to show the following: 1) the union leadership knew of excessive asbestos exposures; 2) leadership conveyed this information to union members; and 3) the broader Libby community, and Plaintiffs' decedents specifically, received this information. BNSF points out, however, that Plaintiffs have not identified the specific evidence they seek to exclude. (Doc. 163 at 9.) The Court agrees that it cannot make its evidentiary ruling in a vacuum. The Court will deny the Motion subject to renewal at trial. The Court directs the parties to identify the evidence they seek to admit or exclude. The Court will address individually each proffer.

4) Evidence regarding remediation and cleanup efforts

Plaintiffs ask the Court to allow some evidence regarding BNSF's Libby cleanup and remediation activities. (Doc. 142 at 16-17.) Plaintiffs argue that Federal Rule of Evidence 407 does not bar categorically this evidence. The Court previously addressed the same issue in resolving BNSF's in limine Motion on this issue. The Court refers the parties to its previous discussion. The Court nevertheless will defer

its ruling on the scope of this evidence until time of trial. The Court directs the parties, outside the presence of the jury, to identify the specific portions of the AOC and/or specific cleanup actions each seeks to either admit or exclude. The Court will address each individually and entertain objections specific to each piece of proffered evidence.

5) Evidence regarding the CARD clinic

Plaintiffs have asked the Court to exclude evidence related to the Center for Asbestos Related Diseases (the “CARD Clinic”), its finances, and any alleged “relationship” with Plaintiffs’ counsel. (*Id.* at 22-23.) Plaintiffs contend that no evidentiary basis exists to permit this evidence because Wells never sought medical treatment at the CARD Clinic and Walder never sought medical treatment at the CARD Clinic for her mesothelioma, the condition at issue in this case. (*Id.*) BNSF points out, however, that Walder received treatment at CARD several times for her claimed asbestos exposure, including several screenings. (Doc. 163 at 10-11.) The Court, without additional context, cannot determine that all information related to Walder’s CARD Clinic visits will prove inadmissible. The Court will deny the Motion subject to renewal at trial. The Court directs BNSF to identify any specific CARD Clinic evidence it seeks to admit outside the presence of the jury. Plaintiffs may raise specific objections as necessary.

6) Preadmission of evidence

Plaintiffs asks the Court to address the preadmission at trial of specific documents relevant to Plaintiffs' case against BNSF. (Doc. 142 at 23.) Plaintiffs represent that this preadmission will facilitate resolution of foundation, authentication, and unwarranted objections at trial. Plaintiffs offer several categories of documents to which their Motion applies. (*Id.*) The Court tends to agree that several of the documents will prove self-authenticating and will not suffer from a lack of foundation. The Court also previously has discussed the potential relevance of the Alton Railroad documents. The Court nevertheless determines that Plaintiffs' request proves premature. The Court will wait for the context of trial before admitting this evidence. The Court will deny the Motion for this reason. The Court will allow the parties to address each of the five identified categories of documents outside the presence of the jury. The Court will resolve individual objections or stipulations to preadmission for each category in turn.

7) Evidence regarding the manner and method of Wells's death

Plaintiffs ask the Court to exclude any argument or evidence regarding the manner Wells's death, including the Seattle Death with Dignity Act, death with dignity, suicide, assisted suicide, or physician assisted suicide, among other references. (Doc. 142 at 28.) Plaintiffs point out that Wells's death certificate accurately reflects the cause of his death as malignant mesothelioma. (*Id.*) Plaintiffs cite in support the relevant death with dignity statute, which provides that "the

patient’s death certificate . . . shall list the underlying terminal disease as the cause of death.” (*Id.* at 29) (citing Rev. Code Wash. § 70.245.040(2)). Plaintiffs assert that the “manner [and] method Mr. Wells chose to depart this world” prove irrelevant to the issues the jury must decide. (*Id.*) Plaintiffs also identify the significant risk of prejudice that would flow from evidence that Wells’s death implicated “physician assisted suicide.” (*Id.*) The Court agrees.

BNSF’s argument that a claim for wrongful death puts at issue the manner of Wells’s death mischaracterizes the claim and Plaintiffs’ burden of proof. Success on their wrongful death claims requires Plaintiffs to prove that, “[a]s a direct and proximate result of the actions of [BNSF,] . . . Plaintiffs’ decedents suffered from asbestos related mesothelioma, and died as a result” and suffered damages. (Doc. 1 ¶ 83); Mont. Code Ann. § 27-1-513. Wells suffered from the terminal disease of malignant mesothelioma. His death certificate reflects this causal link. (Doc. 142 at 29-30.) Equating the specific mechanism that ceased the functions of Wells’s vital organs with causation appears to the Court as akin to asserting that a transition to palliative care would “cause” a hospice patient’s death. These inferences fall outside the scope of the legal causation element Plaintiffs must prove. The Court will grant the Motion for these reasons.

B. Plaintiffs’ Non-Case Specific Motions in Limine (Doc. 144)

Plaintiffs ask the Court to exclude evidence and testimony concerning the following thirteen categories. (Doc. 145.) The Court grants, in part, denies, in part, and defers ruling, in part, on Plaintiffs' Motions.

1) Parties' attorneys' fee arrangements

BNSF does not oppose Plaintiffs' Motion so long as Plaintiffs do not open the door to this evidence. (Doc. 162 at 2.) The Court will grant this Motion, but the Court will allow the parties to seek to admit evidence regarding expert witness fees and similar evidence subject to the constraints of the Federal Rules of Evidence.

2) Attorney hiring or referral arrangements

BNSF represents that it does not seek to introduce evidence regarding Plaintiffs' hiring or referral arrangements. (*Id.* at 3-4.) BNSF argues, however, that the chronology of Walder's previous claims and her retention of counsel before her death remain relevant to the case. (*Id.*) The Court will require additional context before categorically excluding this evidence. Court will deny the Motion subject to renewal at trial. The Court directs BNSF to identify the specific evidence it may seek to introduce outside the presence of the jury.

3) Information about counsel

BNSF does oppose this Motion unless Plaintiffs open the door to the issues. The Court will grant the Motion.

4) Financial status or resources of counsel or their law firms

BNSF does not oppose this Motion so long as Plaintiffs do not open the door to these issues. The Court will grant the Motion.

5) Accommodations or means of transportation for witnesses, parties, counsel

BNSF contends that this evidence may prove relevant to show witness bias. (Doc. 162 at 4.) BNSF offers as an example that a witness's travel by private plane may prove probative of bias. (*Id.*) The Court determines that cross examination regarding witnesses' fee arrangements and previous work for plaintiffs' or defendants' bars likely will provide sufficient space for impeachment. The Court also determines that "Federal Rules of Evidence 403 and 611 counsel against delving into greater detail regarding which hotels experts use, in what restaurants they ate, whether they fly first class, and so on." *In re Welding Fume Prod. Liab. Litig.*, 2010 WL 7699456, at *71 (N.D. Ohio June 4, 2010). The Court will grant the Motion.

6) Adverse effect of judgment on BNSF finances

Plaintiffs argue that evidence suggesting the jury limit or reduce the amount of damages "based on anything other than the admissible evidence in this case would be improper." (Doc. 144 at 14.) BNSF argues the Motion is overly broad but identifies no specific evidence the Motion would exclude improperly. The Court tends to agree that evidence regarding the financial consequences BNSF may suffer appears irrelevant and unfairly prejudicial. The Court will grant the Motion subject

to reevaluation at trial. The Court directs BNSF to identify the specific evidence it believes the Motion would implicate and its intended purpose.

7) Plaintiffs' insurance coverage

BNSF argues that Plaintiffs have failed to identify the economic damages they seek, including a failure to disclose medical billing records. (Doc. 162 at 4-5.) The Court will defer its ruling until time of trial. The Court directs the parties to identify the specific evidence they seek to admit or exclude.

8) Use of deposition video or associated technology

The Court possess broad discretion to limit counsel from using misleading and unfair tactics when presenting evidence to the jury. The Court will grant the Motion as it relates to manipulation of deposition recordings. The Court nevertheless directs the parties to identify the specific depositions or portions thereof they seek to admit or exclude. The Court will reevaluate its ruling as necessary.

9) Unrelated personal matters of a witness

BNSF does not oppose exclusion of unrelated personal matters. (Doc. 162 at 5.) The Court will grant the Motion.

10) Reference to parties' motions in limine filings

BNSF does not oppose this Motion. The Court will grant the Motion.

11) Use of jury consultant

The Court tends to agree that a party's use of a jury consultant remains irrelevant to the issues at trial. The Court will grant the Motion. This evidentiary ruling does not, however, apply to voir dire. BNSF may enquire of the jury pool regarding their familiarity with the jury consultants.

12) Constitutionality or legality of punitive damages

BNSF argues that this Motion may impede its successor company defenses to the punitive damages claim. (*Id.* at 6.) The Court will grant the Motion, but the Court will allow BNSF to defend the punitive damages claim subject to the Federal Rules of Evidence.

13) Settlement demands, offers, or negotiations

BNSF does not oppose this Motion. The Court will grant the Motion.

ORDER

Accordingly, **IT IS ORDERED** that:

- 1) BNSF's Motion in Limine (Doc. 106) is DENIED.
- 2) BNSF's Motion in Limine (Doc. 123) is GRANTED, IN PART, DENIED IN PART, and ruling is DEFERRED, IN PART.
- 3) Plaintiff's Motion in Limine (Doc. 141) is GRANTED, IN PART, DENIED IN PART, and ruling is DEFERRED, IN PART.
- 4) Plaintiffs' Motion in Limine (Doc. 144) is GRANTED, IN PART, DENIED IN PART, and ruling is DEFERRED, IN PART.

DATED this 18th day of August, 2023.

A handwritten signature in blue ink that reads "Brian Morris". The signature is written in a cursive style with a long horizontal stroke at the end.

Brian Morris, Chief District Judge
United States District Court