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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	No. CDV-2020-307 Hon. Kathy Seeley PLAINTIFFS' RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO MODIFY SCHEDULING ORDER
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FILED

MAY 25 2022

ANGIE SPARKS, Clerk of District Court
By  Deputy Clerk

I. Defendants' Supplemental Brief is Unauthorized.

Defendants' Supplemental Brief in Support of Defendants' Motion to Modify Scheduling Order is improper and an abuse of the Montana Rules of Civil Procedure and should be stricken.¹ A supplemental brief may be appropriate if asked for by the Court, or if the Court grants a motion to file a Supplemental Brief. *See, e.g., Grabow v. Montana High Sch. Ass'n*, 2000 MT 159, ¶ 13, 300 Mont. 227, ¶ 13, 3 P.3d 650, ¶ 13 (the court requested supplemental briefs); *Smith v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 225, ¶ 5, 344 Mont. 278, ¶ 5, 187 P.3d 639, ¶ 5 (the court granted a motion to file supplemental briefs). Here, however, the Court has not asked for supplemental briefing and Defendants did not file a motion to file a supplemental brief. Moreover, Defendants' Supplemental Brief comes a week after Defendants submitted a "Notice of Submittal" stating, "the State of Montana's Motion to Modify Scheduling Order or for New Scheduling Conference and Request for Expedited Ruling is fully submitted and ready for decision." Defendants' Supplemental Brief is unauthorized, untimely, and should be stricken.

II. Defendants' Unauthorized Supplemental Brief Repeats Prior Arguments and Contains Misstatements of Fact.

Should the Court decide to consider Defendants' Supplemental Brief, it is important to note that the Supplemental Brief merely restates Defendants' earlier arguments and contains statements that are factually incorrect. *First*, as to the number of witnesses, Defendants neglect to point out that 37 of the 59 lay witnesses identified by the parties are *their* witnesses, and thus there is no need to depose them. Of the remaining 22 lay witnesses, 16 are the youth Plaintiffs, but Defendants

¹ Nowhere do the Montana Rules of Civil Procedure, Uniform District Court Rules, or Montana First Judicial District Court Rules contemplate any party filing a Supplemental Brief. Montana Rule of Appellate Procedure Rule 12(10) states, "Motions to file over-length and supplemental briefs will not be routinely granted. Motions to file such briefs must be supported by an affidavit demonstrating extraordinary justification."

have never noticed depositions for any of the youth Plaintiffs or sought to confer on deposition dates. Moreover, given their young age and the limited scope of their testimony, Plaintiffs have offered to keep these depositions to under two hours, so that many of the Plaintiffs could be deposed in a single day. The remaining six lay witnesses Plaintiffs identified have similarly not been noticed for deposition, even though they were identified five weeks ago.

Second, the expert witnesses Plaintiffs have identified can easily be deposed within a 2-3 week period, and thus there is ample time under the existing scheduling order for Defendants to depose Plaintiffs' experts. Plaintiffs have conferred with their experts to gauge availability during the discovery period and are prepared to get these depositions scheduled, but, again, one week after Plaintiffs filed their expert disclosures, Defendants have yet to send any deposition notices nor have they sought to confer on deposition dates. Defendants' claims that they allegedly lack time to prepare their defense is due to their own failure to conduct discovery in a timely manner.

Third, contrary to Defendants' assertion, Plaintiffs' expert disclosures do not include two "neuropsychological evaluations"² of Plaintiffs. Rather, Plaintiffs' expert disclosures include one psychiatrist, Dr. Lise Van Susteren, who performed profiles of five of the youth Plaintiffs as part of her expert report. Dr. Van Susteren explicitly did not meet with these five Plaintiffs for the purpose of diagnosing or treating them, nor did she do any neuropsychological testing of any kind. As Dr. Van Susteren's expert disclosure clearly states, "I have . . . not performed formal

² A neuropsychological evaluation "is an assessment of how one's brain functions, which indirectly yields information about the structural and functional integrity of your brain. The neuropsychological evaluation involves an interview and the administration of tests. The tests are typically pencil and paper type tests. Some tasks might be self-reports meaning that they are completed by the patient with assistance from a technician, but the majority of the tests require administration by a neuropsychologist or trained, skilled psychometrist." UNC School of Medicine, *Department of Neurology*, <https://www.med.unc.edu/neurology/divisions/movement-disorders/npsycheval> (accessed May 24, 2022).

psychological testing for specific disorders to make individual diagnoses pursuant to the Diagnostic and Statistical Manual of Mental Disorders (DSM–5-TR).” Dr. Van Susteren Expert Report, May 18, 2022 at p. 5. Defendants offer no explanation as to why independent medical evaluations would be warranted under the circumstances here. This is not a tort case seeking individual monetary damages. Moreover, Defendants have known since Plaintiffs’ Complaint was filed over two years ago, that Plaintiffs are alleging mental health injuries for the purpose of establishing standing. *See, e.g.*, Complaint ¶¶ 25, 32, 39, 45, 57, 61, 178-180; *see also* Order on Mot. to Dismiss at 14 (referencing Plaintiffs’ mental and emotional health injuries).

CONCLUSION

To date, both Plaintiffs and Defendants have met every deadline in this Court’s Scheduling Order. On May 18, 2022, Plaintiffs submitted their expert disclosures, as required by this Court’s Scheduling Order, issued over five months ago. Defendants’ unauthorized Supplement Brief offers no new evidence as to why they cannot present a fair defense in this case or why they cannot complete the discovery in the timeframe provided by the Court, or with a 45-day extension to the close of discovery, as Plaintiffs have proposed. Rather, Defendants, again complain about a problem of their own making: the number of lay witnesses disclosed, the majority of whom are their own witnesses. Defendants have still not noticed any fact witness depositions nor any expert witness depositions. Any inability for Defendants to get discovery completed is due to the State’s delay in commencing discovery.

This Court should strike Defendants’ unauthorized Supplemental Brief and deny Defendants’ Motion to modify the scheduling order because it is ill-timed, fails to show good cause, and would be prejudicial to the 16 children that brought this case over two years ago.

DATED this 25th day of May, 2022.

/s/ Barbara Chillcott

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered by email to the following on May 25, 2022:

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