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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.*	Cause CDV-2020-307 Hon. Kathy Seeley **BRIEF IN SUPPORT OF STATE'S MOTION FOR RULE 26(f) DISCOVERY CONFERENCE**

INTRODUCTION

Pursuant to Montana Rule of Civil Procedure 26(f), the State respectfully moves for a discovery conference with the Court. The parties have reached an

impasse on several pivotal discovery issues.

The parties agree that a Rule 26(f) conference is necessary. Yet Plaintiffs apparently view the concerns raised by the State as a delay tactic. But the State has no reason to delay this litigation. From the State's perspective, any delay results from Plaintiffs' intransigence and gamesmanship. Plaintiffs' counsel have even withdrawn Plaintiffs' availability for depositions, threatening that Plaintiffs may not be available for depositions at any point in the future. The State brings these issues to the Court's attention to ensure discovery proceeds smoothly.

APPLICABLE STANDARDS

Discovery exists to ensure all parties have access to the basic facts and issues in a case. *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634 (internal quotations omitted). When a party's failure to comply with discovery procedures effectively halts the discovery process, it results in impermissible prejudice to the opposing party. *See McKenzie v. Scheeler*, 285 Mont. 500, 516, 949 P.2d 1168, 1177 (1997). To avoid this, a district court regulates discovery to ensure a fair trial to all concerned. *Hobbs v. Pac. Hide & Fur Depot* (1989), 236 Mont. 503, 512, 771 P.2d 125, 131. One tool at a court's disposal is a Rule 26(f) discovery conference. Mont. R. Civ. P. 26(f). Courts shall grant a discovery conference "upon motion by the attorney for any party if the motion includes:

> (1) a statement of the issues as they appear;
>
> (2) a proposed plan and schedule of discovery;
>
> (3) any limitations proposed to be placed on discovery;
>
> (4) any issues relating to discovery of electronically-stored information, including the form or forms in which it should

be produced;

(5) any other proposed orders with respect to discovery; and

(6) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys in the matters set forth in the motion."

Mont. R. Civ. P. 26(f).

ARGUMENT

I. Statement of the issues.

Since this Court modified the Scheduling Order on June 15, 2022, the parties have met and conferred multiple times and engaged in several rounds of correspondence. Nevertheless, they have reached an impasse on several key discovery issues. These issues are:

- Whether Plaintiffs have fully and completely responded to the State's written discovery requests;
- Whether Plaintiffs have raised improper boilerplate objections to the State's requests for discoverable information related to Plaintiffs' alleged injuries;
- Whether Plaintiffs' out-of-state attorneys may unilaterally withdraw Plaintiffs' availability for depositions after the State agreed to tentatively hold open Plaintiffs' requested dates for depositions but refused to confirm those dates until it had reviewed Plaintiffs' supplemental production of documents related to Plaintiffs' claimed injuries (Plaintiffs just tried this on Friday).
- Whether four of the youngest Plaintiffs—Nathaniel (age 4), Jeffrey (age 8), Lilian (age 11), and Ruby (age 14) should remain in this lawsuit (Plaintiffs say yes), and, if so, whether the State may depose them (Plaintiffs say no);
- Whether the State may depose the former guardians of Plaintiffs who have now reached the age of majority (Plaintiffs say no);
- Whether the State may conduct a Rule 35 examination of Plaintiffs who have claimed psychological injuries, *see* (Docs. 156, 157) (Plaintiffs insist this would be inappropriate despite submitting and relying on the Van Susteren Expert Report);
- The scope of relief available to Plaintiffs and the Court's rationale for concluding that Plaintiffs' remaining claims are justiciable *see* (Docs. 159, 160) (Plaintiffs claim that this is clear as day but offer no explanation as to why);

Counsel for the State has made reasonable efforts to reach agreement with

Plaintiffs on these issues. *See* Mont. R. Civ. P. 26(f)(6). Gamesmanship by Plaintiffs' out-of-state attorneys has prevented meaningful negotiation on these issues. Throughout discovery, Plaintiffs' counsel has purported to impose arbitrary and unreasonable deadlines on the State in a naked attempt to compel a rushed response and gain a tactical upper hand. Last week, this gamesmanship reached its low point. Plaintiffs' attorneys informed the State that they were available for depositions on certain days in August. The State told Plaintiffs' counsel that it would tentatively hold open these dates but couldn't commit to them until Plaintiffs supplemented their deficient discovery responses by providing requested documents relevant to Plaintiffs' standing and alleged harm, among other things. On July 25, 2022, the State sent Plaintiffs more than 10 pages detailing deficiencies in Plaintiffs' discovery, most of which related to the paucity of documents relevant to Plaintiffs' claimed injuries in the more than 42,000 pages Plaintiffs produced. On July 27, 2022, Plaintiffs supplemented their discovery, producing hundreds of pages of documents that would supposedly remedy the deficiencies the State identified in its July 25 letter. On July 28 and 29, Plaintiffs again threatened to withdraw their availability for depositions unless the State firmly committed to the dates they had provided by 5:00 PM on July 29. Counsel for the State confirmed—for the second time—that the State would tentatively hold these deposition dates but could not comply with Plaintiffs' arbitrary deadline because the State needed time to review the supplemental production and determine if Plaintiffs cured all discovery deficiencies. The State also made clear that it would not comply with Plaintiffs' "deadlines." Opposing counsel now claim that the

State may not be able to depose Plaintiffs **at all.** Plaintiffs' counsel represented they were unilaterally withdrawing the dates they previously offered and were—after 5:00 P.M. on a Friday—beginning to book other matters for those dates.

To sum up: Plaintiffs' out-of-state attorneys have now threatened to withdraw Plaintiffs' availability for *any* depositions because the State refused to comply with Plaintiffs' arbitrary deadline of 5:00 P.M. on July 29, 2022. This is naked gamesmanship, contrary to the spirit and purpose of discovery. Discovery exists "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*, ¶ 22 (internal quotations omitted). "Modern instruments of discovery, together with pretrial procedures, '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.'" *Id.* (quotations omitted). In other words, discovery is not an opportunity for gamesmanship or for one party to gain an upper hand over the other. Plaintiffs' withholding of relevant information, parties, and witnesses from the discovery process "directly contravene[s] the express purpose of discovery" and threatens to "undermine[] the integrity of the litigation." *Id.* When a party's failure to comply with discovery procedures effectively halts the discovery process, it results in impermissible prejudice to the opposing party. *See McKenzie v. Scheeler*, 285 Mont. 500, 516, 949 P.2d 1168, 1177 (1997). Discovery is not about hiding the ball but ensuring that "the basic issues and facts" of this case are "disclosed to the fullest

practicable extent." *Richardson*, ¶ 22

Long story short: we have reached the point at which Plaintiffs' attorneys are claiming that Plaintiffs may not be available for *any* depositions. The State believes that the Court's assistance is necessary to help the parties resolve these issues and ensure that discovery proceeds efficiently and fairly. Montana's liberal discovery rules don't allow Plaintiffs to use their availability for depositions as leverage to gain a tactical advantage. *Richardson*, ¶ 22; *McKenzie*, 285 Mont. at 516, 949 P.2d at 1177. But the State remains optimistic that, with the Court's assistance, the parties can agree on a reasonable, fair, discovery plan.

II. State's proposed plan, schedule of discovery, proposed limitations on discovery and other proposed orders relating to discovery.[1]

First, the State requests an order making clear that it may depose every Plaintiff in this lawsuit. Plaintiffs have no legal justification for seeking to bar the State from deposing every Plaintiff in this case. The State has made, and will continue to make, good-faith efforts to accommodate Plaintiffs' school schedules. But the State's efforts to accommodate Plaintiffs are a good-faith gesture, not a waiver of the State's absolute right to depose every plaintiff in this case. Plaintiffs' out-of-state attorneys don't get to use Plaintiffs' availability as a bargaining chip or to obtain tactical leverage over the State.

[1] The State doesn't believe there are any issues related to discovery of electronically-stored information, including the form or forms in which it should be produced. Mont. R. Civ. P. 26(f)(4).

In a similar vein, the State needs additional time to determine if Plaintiffs have provided full and complete responses to the State's written discovery requests. The State cannot depose Plaintiffs before receiving full discovery—especially as it relates to Plaintiffs' allegedly "unique" injuries. The State fully intends to complete depositions under the current scheduling order and will continue to work with Plaintiffs to accommodate their school schedules while ensuring that the parties complete all depositions before the close of discovery on January 9, 2023.

The State next requests that the Court strongly encourage Plaintiffs to dismiss the four youngest Plaintiffs from this lawsuit. It is simply not appropriate for children aged 4, 8, 12, and 14 to participate as plaintiffs in a contentious civil lawsuit. The State has—on multiple occasions—urged Our Children's Trust to proceed with a few older plaintiffs in this lawsuit. They have refused.

Additionally, the State requests an order that the State may depose the former guardians of Plaintiffs who have reached the age of majority. These former guardians were parties to this lawsuit. They clearly have knowledge of relevant information, especially related to Plaintiffs' alleged injuries. The State is entitled to discovery regarding any non-privileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. Mont. R. Civ. P. 26(b)(1); *see also* Mont. R. Civ. P. 26(a) (allowing depositions as a form of discovery). The former guardians of certain

Plaintiffs are obvious witnesses to the allegations of the Complaint and will certainly have knowledge of discoverable information.

CONCLUSION

The State respectfully requests that the Court grant its motion for a discovery conference pursuant to Mont. R. Civ. P. 26(f).

DATED this 1st day of August, 2022.

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CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was delivered by email to the following:

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Date: August 1, 2022

Dia C. Lang

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