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FILED

OCT 14 2022

ANGIE SPARKS, Clerk of District Court
By K. KRESGE Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

RIKKI HELD, et al.,

Plaintiff,

v.

STATE OF MONTANA, et al.,

Defendant.

Cause No. CDV-2020-307

**ORDER ON MOTION UNDER
RULE 35(a) FOR
INDEPENDENT MEDICAL
EXAMINATIONS**

Defendants State of Montana, et al. (State) have moved under Montana Rule of Civil Procedure 35(a) for Independent Medical Examinations (IMEs) of eight of the named Plaintiffs in this case. The State argues that Plaintiffs have placed their mental health in controversy, and that the State has good cause for requesting the IMEs. Plaintiffs oppose the motion, both parties have submitted briefs, and the matter is ready for decision.

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1 **BACKGROUND**

2 The background pertinent to this motion follows:

3 In their complaint challenging the constitutionality of the State
4 Energy Policy and Climate Change Exception to the Montana Environmental
5 Policy Act, Plaintiffs allege, among other injuries, types of emotional distress
6 such as anxiety and despair, caused by climate change, environmental
7 degradation, and government action/inaction they argue is making climate
8 change worse. Plaintiffs have also submitted an expert disclosure and report from
9 Dr. Lise Van Susteren, M.D., a psychiatrist who has studied the relationship
10 between climate change and mental health. Van Susteren’s report sets forth her
11 qualifications, lays out the academic basis for the relationship between climate
12 change, government action/inaction, and mental health, describes her
13 methodology for interviewing five of the Plaintiffs, and includes profiles of each
14 of the five she interviewed. The State argues it is “entitled to test whether the two
15 laws Plaintiffs challenge have caused their allegedly severe psychological
16 injuries, or whether other causes are responsible,” and demands IMEs not only
17 for the five Plaintiffs interviewed by Van Susteren, but for three additional
18 Plaintiffs as well. Defs.’ Reply Supp. Mot. For IMEs at 7.

19 **LEGAL STANDARD**

20 Unlike other rules of discovery, Rule 35 has “a high standard” that
21 must be met before a court may order an IME. *Lewis v. Mont. Eighth Jud. Dist.*
22 *Ct.*, 2012 MT 200, ¶ 7, 366 Mont. 217, 286 P.3d 577. Montana courts apply the
23 following test before ordering an IME: 1) a party’s mental or physical condition

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1 must really and genuinely be in controversy, and 2) the movant must show good
2 cause. *Id.*, ¶ 6; *In re Marriage of Binsfield*, 269 Mont. 336, 341, 888 P.2d 889
3 (1995). See also, *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964).

4 IMEs are “an extraordinary form of discovery,” “the most intrusive
5 and, therefore, the most limited discovery tool,” and “must be balanced against
6 Plaintiffs’ constitutional right to privacy under Montana Constitution Article II,
7 Section 10.” *State ex rel. Mapes v. Dist. Ct. of the Eighth Jud. Dist.*, 250 Mont.
8 524, 529, 532, 822 P.2d 91 (1991); *Simms v. Mont. Eighteenth Jud. Dist. Ct.*,
9 2003 MT 89, ¶ 30, 315 Mont. 135, 68 P.3d 678; *Lewis*, ¶ 6.

10 “The language of the rule is discretionary. It authorizes, but does
11 not require, a district court to order a party to submit to a
12 psychological examination” even when the high standard has been
13 met. *Binsfield*, 269 Mont. at 340. “[I]t is well accepted that a party
does not possess an absolute right to obtain an independent medical
examination.”

14 *Simms*, ¶ 28.

15 DISCUSSION

16 I. Is Plaintiffs’ mental health “really and genuinely in 17 controversy?”

18 Defendants argue Plaintiffs have made an “unfortunate choice to
19 place their mental health at the center of this case,” and that “[t]he issue of
20 standing very well may turn on” the psychological component of Plaintiffs’
21 alleged injuries. Defs.’ Br. Supp. Mot. For IMEs at 2; Defs.’ Reply Supp. Mot.
22 For IMEs at 4-5. Plaintiffs maintain that the emotional and psychological harms
23 they allege are not part of an independent tort claim or a claim for damages, but
24 merely bolster their standing to challenge the constitutionality of the statutes at
25 issue. Pl.’s Br. Opp. Mot. For IMEs at 2. Plaintiffs argue that the “undisputed

1 nature of the constitutional claims and relief at issue do not include damages
2 based on proving (or defending against) emotional injury.” Pl.’s Br. Opp. Mot.
3 For IMEs at 13.

4 In *Lewis v. Mont. Eighth Jud. Dist. Ct.*, the Montana Supreme
5 Court cited *Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995), and set
6 forth a list of factors helpful to past courts in determining whether a party’s
7 mental health is in controversy. *Lewis*, ¶ 8. Defendants cite *Turner* and assert
8 that applying the *Turner* factors will lead this court to hold that Plaintiffs have
9 put their mental health in controversy. However, in *Lewis*, the Court quoted
10 *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 554 (N.D. Ga. 2001), which
11 lists the factors as follows:

12 The majority of federal courts "recognize that a mental exam is
13 warranted when one or more of the following factors are present: (1)
14 a tort claim is asserted for intentional or negligent infliction of
15 emotional distress; (2) an allegation of a specific mental or
16 psychiatric injury or disorder is made; (3) a claim of unusually
17 severe emotional distress is made; (4) plaintiff intends to offer expert
18 testimony in support of [a] claim for emotional distress damages;
19 and/or (5) plaintiff concedes that her mental condition is in
20 controversy within the meaning of Rule 35."

21 *Lewis*, ¶ 8.

22 Applying these factors to the instant case, factors two, three, and
23 four are potentially applicable. Regarding the fourth factor, expert testimony to
24 support a claim for emotional distress damages, Defendants are correct that the
25 original *Turner* list did not include the word “damages”. However, that factor has
evolved. The *Lewis* court quoted the factors as set forth in *Stevenson*, and, since
Lewis is binding precedent, this court will use the same language. Van Susteren’s
testimony is not being offered to support an independent claim for emotional

1 distress damages, but as part of standing to challenge the constitutionality of
2 statutes. Therefore, Van Susteren's report does not, on its own, bring Plaintiffs'
3 mental health into controversy under factor four.

4 As to factors two and three, Defendants argue that Van Susteren's
5 use of the terms "pre-traumatic stress disorder," "abuse," and "profound
6 psychological damage" in her report bring the alleged distress into controversy.
7 Defs.' Br. Supp. Mot. For IMEs at 6, 8. However, Plaintiffs have not alleged any
8 diagnoses of specific psychiatric injuries, which are typically present when courts
9 order IMEs. In *Turner* itself, which Defendants repeatedly cite, the United States
10 District Court for the Southern District of California ultimately held:

11 This court concludes that "emotional distress" is not synonymous
12 with the term "mental injury" as used by the Supreme Court in
13 *Schlagenhauf v. Holder* for purposes of ordering a mental
14 examination of a party under Rule 35(a), and specifically disagrees
15 with those few cases holding that a claim for damages for emotional
16 distress, without more, is sufficient to put mental condition "in
17 controversy" within the meaning of the Rule. If this were the law,
18 then mental examinations could be ordered whenever a plaintiff
19 claimed emotional distress or mental anguish. Rule 35(a) was not
20 meant to be applied in so broad a fashion.

21 *Turner* at 97.

22 Notably, the plaintiff in *Turner* was seeking more than one million dollars in
23 damages for mental anguish and emotional distress. The *Turner* court still held
24 that her mental health was not in controversy. *Id.*

25 Even when there is a tort claim for emotional distress or
psychological damages, courts are cautious about ordering IMEs. In *Lewis*, the
Montana Supreme Court stated, "[w]e have never ruled that a plaintiff's claim for
general emotional distress damages is, in and of itself, a sufficient basis for

1 ordering a Rule 35 mental examination.” *Lewis*, ¶ 8. Defendants correctly assert
2 that independent tort claims or emotional distress damages are not required to
3 order an IME, but their absence in this case leads the court to take a cautious
4 approach before ordering “the most intrusive and, therefore, the most limited
5 discovery tool.” *Simms*, ¶ 30.

6 Plaintiffs have not placed their mental health at the center of this
7 case, nor is it really and genuinely in controversy. First, the court disagrees with
8 Defendants’ assertion that Plaintiffs’ standing “very well may turn” on the issue
9 of psychological harm. Plaintiffs have also alleged economic, physical health,
10 aesthetic, and recreational injuries. The emotional harm issue is not a core issue
11 in the case. Second, the types of mental anguish and emotional distress alleged by
12 Plaintiffs and supported by Van Susteren’s testimony are not the specific or
13 unusually severe psychiatric injuries or disorders contemplated in the factors
14 articulated in *Stevenson* and *Lewis*. Van Susteren’s report uses novel
15 terminology, which may be grounds for an evidentiary challenge, but not for
16 ordering a swath of IMEs for eight Plaintiffs. Defendants have failed to show that
17 Plaintiffs’ mental health is really and genuinely in controversy.

18 **II. Has the State shown good cause for their requested**
19 **IMEs?**

20 “A psychiatric examination is particularly invasive of an
21 individual’s right to privacy.” *State ex rel. Mapes*, at 532. The Rules of Civil
22 Procedure “should be liberally construed, but they should not be expanded by
23 disregarding plainly expressed limitations.” *Schlagenhauf* at 121. “[B]y adding
24 the words ‘. . . good cause . . .,’ the Rules indicate that there must be greater
25 showing of need under Rules 34 and 35 than under the other discovery rules.”

1 *Id.* at 118. “Obviously, what may be good cause for one type of examination may
2 not be so for another. The ability of the movant to obtain the desired information
3 by other means is also relevant.” *Id.*

4 Even if Plaintiffs’ mental health were in controversy, Defendants
5 have not established good cause for the requested examinations, which they say,
6 “may also include, but is not limited to,” probing into Plaintiffs’ “psychological
7 and behavioral history, alcohol and drug use, school performance, and exposure
8 to trauma.” Defs.’ Br. Supp. Mot. For IMEs at 5. The scope is too broad.

9 To meet the threshold requirement of standing, Plaintiffs alleged
10 economic, physical health, aesthetic, and recreational injuries. Some of their
11 alleged injuries are mental and emotional in nature, including fear, anxiety, and
12 despair caused by climate change and the government action/inaction that is
13 allegedly making it worse. In response, Defendants propose a fishing expedition
14 to find some other cause for that distress. For example, the State cites Plaintiff
15 Rikki Held’s feelings of “stress and despair when thinking about how the State of
16 Montana has known about climate disruption for decades.” Compl., ¶ 20.

17 Defendants’ proposed method of defending against the allegations of mental
18 anguish is to subject Rikki Held to an invasive interrogation about her school
19 performance, past trauma, and psychological history. The State characterizes the
20 proposed IMEs as “ask[ing] the Youth Plaintiffs *questions* . . . [t]hat’s it.” Defs.’
21 Reply Supp. Mot. For IMEs at 6 (emphasis in original). What Defendants gloss
22 over is that those *questions* could be about anything as innocuous as their grades,
23 which are still protected by their right to privacy, all the way to deeply private
24 and upsetting matters as childhood abuse. Allowing this intrusion would be an
25 unnecessary violation of Plaintiffs’ right to privacy. *Simms*, ¶ 32; *State ex rel.*
Mapes at 532.

1 The State is not, as it asserts, “flying blind.” Defs.’ Br. Supp. Mot.
2 For IMEs at 9. It was provided Van Susteren’s full report, including confidential
3 information, through discovery. Furthermore, as Plaintiffs observe, the State has
4 ample alternatives to mount an informed defense. To start, the State is currently
5 deposing Plaintiffs. The State may also depose and cross-examine Van Susteren.
6 Furthermore, the State may call their own expert to dispute Van Susteren’s
7 conclusions and methodology without subjecting Plaintiffs to invasive IMEs.
8 These are just a few of the options available to the State to defend itself on this
9 issue. The State has not met its burden to show good cause for the requested
10 psychological examinations because the scope is too broad, and it has ample
11 alternatives to defend against the claims of mental anguish and emotional
12 distress.

13 **III. Should this court strike Plaintiffs’ allegations of**
14 **psychological distress and Van Susteren as an expert witness?**


15 As an alternative to the IMEs, the State asks the court to strike all
16 allegations of psychological harm and disallow any opinions or testimony by Van
17 Susteren. Plaintiffs’ allegations in the complaint are within the bounds of general
18 emotional distress and the court will not strike them. As to Van Susteren’s report,
19 Plaintiffs correctly assert that “Montana law regarding Rule 35 discovery does
20 not control the separate standards that might apply if the State wishes to
21 challenge Dr. Van Susteren’s future expert testimony. Those standards—by
22 contrast—fall under the Montana Rules of Evidence.” Pl.’s Br. Opp. Mot. For
23 IMEs at 17. Tacking this request on the end of a Rule 35 motion without citing an
24 applicable Rule providing the basis to strike does not properly place the issue
25 before the court.

1 **CONCLUSION**

2 The court views the mini trial emerging over the psychological
3 components of Plaintiffs' standing as a distraction. Even if the psychological
4 aspects of Plaintiffs' injuries were excluded, Plaintiffs have standing based on
5 alleged economic, physical health, aesthetic, and recreational injuries. The State
6 has not met its high burden to show Plaintiffs' mental health is really and
7 genuinely in controversy, nor that there is good cause to order IMEs for eight of
8 the Plaintiffs.

9 The Rule 35(a) motion for IMEs of eight Plaintiffs by Dr. Stratford
10 is **DENIED**.

11 DATED this 14 day of October, 2022.

12 
13 KATHY SEBLEY
14 District Court Judge

15
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KS/sm/CDV-2020-307 Ord Mot Under Rule 35(a) for IME