

Melissa Hornbein
Barbara Chillcott
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dlefridge@mcgarveylaw.com

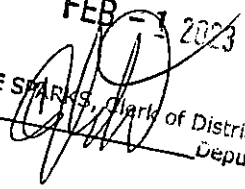
Nathan Bellinger (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Julia Olson (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
(650) 278-2957
pgregory@gregorylawgroup.com

Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley PLAINTIFFS' MOTION IN LIMINE NO. 2: BRIEF IN SUPPORT OF MOTION RE: REMOTE TESTIMONY AT TRIAL
------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------

FILED
FEB 1 2023
By: 
ANGIE SPARKS, Clerk of District Court
Deputy Clerk

INDEXED

202

Plaintiffs Rikki Held, *et al.*, by counsel, and pursuant to the Court's Modified Scheduling Order (Doc. 145), entered June 15, 2022, respectfully submit the following brief in support of their motion *in limine* requesting the Court permit witnesses to testify remotely at trial. Such remote testimony would be in conformance with the rules utilized by this Court during the COVID-19 pandemic and during which Montana courts were repeatedly offered guidance to use remote-hearings. *See* May 22, 2020 Memorandum from Mike McGrath, Chief Justice, Montana Supreme Court, to Montana District Court Judges et al. at 1-2, 3-4 (<https://perma.cc/F79T-HY2N>) (May 22 COVID Memo); *see also* March 27, 2020 Order, In the Matter of the Statewide Response by Montana State Courts to the COVID-19 Public Health Emergency, 2020 Mont. LEXIS 924 * (March 27 COVID Order); April 27, 2020 Memorandum from Mike McGrath, Chief Justice, Montana Supreme Court, to Montana District Court Judges et al. (<https://perma.cc/S3C9-WEGK>) (April 27 COVID Memo); December 21, 2020 Memorandum from Mike McGrath, Chief Justice, Montana Supreme Court, to Montana District Court Judges et al. (<https://perma.cc/L3EN-LFGV>) (December 21 COVID Memo). Further, the Montana Rules of Civil Procedure provide authority for such testimony in this case: "the court may permit testimony in open court by contemporaneous transmission from a different location," for good cause in compelling circumstances. Mont. R. Civ. P. 43(a) (Taking Testimony).

Good cause for the remote testimony of and compelling circumstances exist for Plaintiffs' Rebuttal Expert, Kevin Trenberth. Dr. Trenberth lives in New Zealand. In late September 2022, Dr. Trenberth was in a serious accident where he broke his pelvis. As of January 2023, he cannot walk without crutches, with no weight bearing on his right leg. Based on his medical condition, it is doubtful that Dr. Trenberth will be able to travel from New Zealand to Montana to testify at trial.

Thus, Plaintiffs request an order that Dr. Trenberth be allowed to remain in New Zealand and testify at trial remotely through the Court's standard method of two-way audio-visual electronic communication. Plaintiffs are prepared to assume responsibility for, and costs associated with, implementing the requested two-way audio-visual electronic communication for Dr. Trenberth. Further, Plaintiffs are prepared to broaden the scope of the order to the extent other witnesses experience similar medical emergencies such that they are not able to testify in person at trial.

I. APPLICABLE STANDARDS

A motion *in limine* is a “request for guidance by the court regarding an evidentiary question, which the court may provide at its discretion to aid the parties in formulating trial strategy.” *Hunt v. K-Mart Corp*, 1999 MT 125, ¶ 11, 294 Mont. 444, 981 P.2d 275; *see also Speaks v. Mazda Motor Corp.*, 118 F. Supp. 3d 1212, 1217 (D. Mont. 2015) (a motion *in limine* is a “procedural device[] to obtain an early and preliminary ruling on the admissibility of evidence.”). The district court’s authority to grant or deny a motion *in limine* “rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties.” *City of Helena v. Lewis*, 260 Mont. 421, 425-26, 860 P.2d 698, 700 (1993) (quoting *Feller v. Fox*, 237 Mont. 150, 153, 772 P.2d 842, 844 (1989) (overruled on other grounds by *Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162 P.3d 134)). “[T]he authority to grant or deny a motion *in limine* rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties.” *Daley v. Burlington N. Santa Fe Ry.*, 2018 MT 197, ¶ 7, 392 Mont. 311, 425 P.3d 669 (quoting *State v. Ankeny*, 2010 MT 224, ¶ 38, 358 Mont. 32, 243 P.3d 391) (alteration in original).

II. BACKGROUND ON DR. TRENBERTH'S MEDICAL CONDITION

In late September 2022, Dr. Trenberth was in a serious accident where he broke his pelvis. As of the filing of this motion, Dr. Trenberth is far from healed. He has trouble sitting for more than two hours. His right foot and ankle are non-functional and his right leg swells up unless he can keep it above his heart. For obvious reasons, it is doubtful that Dr. Trenberth will be able to travel to Montana for trial in June 2023 to provide his rebuttal testimony in person.

Dr. Trenberth described his medical condition during his deposition on January 11, 2023:

So over four months ago, I was walking my dog and attacked by a pit bull, and he threw me over a small cliff, and I have a broken pelvis. So I am on crutches and walking on one leg, recovering slightly but still with difficulty It does mean travel is difficult for me.

Trenberth Dep. 35:15-36:7.

III. ARGUMENT

The Montana Rules of Civil Procedure provide authority for remote testimony in this case: “the court may permit testimony in open court by contemporaneous transmission from a different location,” for good cause in compelling circumstances. Mont. R. Civ. P. 43(a) (Taking Testimony). During the COVID-19 pandemic, the judicial system was “operating under unprecedented circumstances” and the Court frequently utilized methods of two-way audio-visual electronic communication. *Strommen v. Mont. Seventeenth Judicial Dist. Court*, 401 Mont. 554 (2020) (citing *Disability Rights Mont. v. Mont. Judicial Dists. 1-22*, No. OP 20-0189, Order, 2020 Mont. LEXIS 973 (Apr. 1, 2020); *Guyer v. Mont. Eighth Judicial Dist. Court*, No. OP 20-0233, Order, 2020 Mont. LEXIS 1933 (June 30, 2020)). Dr. Trenberth’s serious medical condition constitutes good cause for his remote testimony, which can be conducted pursuant to the Court’s recent practices for remote testimony.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court enter an order *in limine* that Dr. Trenberth be allowed to remain in New Zealand and testify at trial remotely through the Court's standard method of two-way audio-visual electronic communication. Plaintiffs will assume responsibility for, and costs associated with, implementing the requested two-way audio-visual electronic communication for Dr. Trenberth. Further, Plaintiffs believe the scope of this order should be broadened to the extent other witnesses experience similar medical emergencies such that they are not able to testify in person at trial.

DATED this 1st day of February, 2023.

/s/ Barbara Chillcott
Barbara Chillcott
Melissa Hornbein
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dlefridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Julia Olson (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org

julia@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)

Gregory Law Group

1250 Godetia Drive

Redwood City, CA 94062

(650) 278-2957

pgregory@gregorylawgroup.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered by email to the following on February 1, 2023:

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: ~~406-444-2026~~
Fax: ~~406-444-3549~~

MICHAEL RUSSELL
THANE JOHNSON
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: ~~(406) 444-2026~~
michael.russell@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

MARK L. STERMITZ
Crowley Fleck PLLP
305 S. 4th Street E., Suite 100
Missoula, MT 59801
Phone: 406-523-3600
mstermitz@crowleyfleck.com

SELENA Z. SAUER
Crowley Fleck PLLP
1667 Whitefish Stage Road
Kalispell, MT 59901
ssauer@crowleyfleck.com

/s/ Barbara Chillcott
Barbara Chillcott