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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 No. CDV-2020-307  Hon. Kathy Seeley  <b>PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION <i>IN LIMINE</i> NO. 4 (PRECLUDING ANY WITNESS NOT QUALIFIED OR DESIGNATED AS EXPERT)</b>
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FILED

FEB 16 2023

ANGIE SPARKS, Clerk of District Court  
By  Deputy Clerk

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By the three paragraphs in their Motion *in Limine* No. 4, Defendants request a hodge podge of relief. In their first sentence, Defendants seek to preclude “any witness not qualified or properly designated as an expert from offering opinions that should be based on a reasonable degree of scientific certainty.” Next, Defendants seek to preclude “any party” from soliciting “expert opinions from witnesses”: (1) “who are not qualified as experts to give testimony on a given topic,” or (2) “whose opinions have not been previously disclosed in accordance with the Court’s Scheduling Order or in response to discovery requests.” Finally, Defendants seek to preclude testimony from unidentified “lay witnesses or unqualified and/or undisclosed experts” “who do not adhere to the standard of scientific certainty,” as “more prejudicial than probative and should be excluded under M. R. Evid. 403.”

Plaintiffs do not oppose, as requested by Defendants’ Motion *in Limine* No. 4, that the Court should order all Parties from soliciting “expert opinions from witnesses”: (1) “who are not qualified as experts to give testimony on a given topic,” or (2) “whose opinions have not been previously disclosed in accordance with the Court’s Scheduling Order or in response to discovery requests.” However, because that is the law in Montana, Plaintiffs see no need for the Court to issue an order to that effect.

However, because it is *not* the law in Montana, Plaintiffs oppose Defendants’ precedent-setting preclusion of expert witnesses who allegedly offer opinions not “based on a reasonable degree of scientific certainty.” Also, again because it is *not* the law in Montana, Plaintiffs oppose precluding testimony from unidentified “lay witnesses or unqualified and/or undisclosed experts” “who do not adhere to the standard of scientific certainty,” as “more prejudicial than probative and should be excluded under M. R. Evid. 403.”

Because there is no case law or rules supporting any aspect of their argument, Defendants cite no authority for their position that all expert opinions in a bench trial must meet the standard of “a reasonable degree of scientific certainty.” In fact, M. R. Evid. 702 permits “a witness qualified as an expert by knowledge, skill, experience, training, or education” to testify “in the form of an opinion or otherwise” if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Rule 702 requires testing an expert’s reliability against: “(1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts.” *Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶ 35, 367 Mont. 21, 289 P.3d 131; *State v. Clifford*, 2005 MT 219, ¶ 28, 328 Mont. 300, 121 P.3d 489.

Montana did not adopt post-*Daubert* versions of Federal Rule of Evidence 702. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). As written, both Fed. R. Evid. 702 and M. R. Evid. 702 state that a witness who is “qualified as an expert” may testify if her “knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702(a); M. R. Evid. 702. “That is where the Montana rule stops.” *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 23, 380 Mont. 204, 354 P.3d 604. Fed. R. Evid. 702, however, further conditions admission on whether “(b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702(b)-(d). Montana did not adopt those conditions.

Finally, Defendants point to no specific witnesses, lay or expert, who offer opinions allegedly not “based on a reasonable degree of scientific certainty” and testimony from “lay witnesses or unqualified and/or undisclosed experts” who allegedly “do not adhere to the standard

of scientific certainty,” as “more prejudicial than probative and should be excluded under M. R. Evid. 403.” Thus, neither Plaintiffs nor this Court have context to reference any particular witness or testimony to determine what opinions Defendants assert are not “based on a reasonable degree of scientific certainty” or testimony from “lay witnesses or unqualified and/or undisclosed experts” who Defendants assert “do not adhere to the standard of scientific certainty,” as “more prejudicial than probative and should be excluded under M. R. Evid. 403.”

Trial courts are “vested with great latitude in ruling on the admissibility of expert testimony.” *Cartwright v. Scheels All Sports, Inc.*, 2013 MT 158, ¶ 37, 370 Mont. 369, 310 P.3d 1080. As Defendants identify no specific witnesses, experts, or testimony which should be precluded and Defendants cite no authority for any of their arguments that all expert opinions in a bench trial must meet the standard of “a reasonable degree of scientific certainty,” this Court should deny Defendants’ Motion *in Limine* No. 4 to the extent it seeks to preclude expert witnesses who allegedly offer opinions not “based on a reasonable degree of scientific certainty” and testimony from unidentified “lay witnesses or unqualified and/or undisclosed experts” “who do not adhere to the standard of scientific certainty,” as “more prejudicial than probative and should be excluded under M. R. Evid. 403.” To the extent the Court grants any aspect of Defendants’ Motion *in Limine* No. 4, such a ruling should apply equally to all testimony presented by Defendants’ witnesses.

DATED this 16th day of February, 2023.

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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 February 16, 2023:

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