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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 PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION <i>IN LIMINE</i> NO. 6 (REQUIRING LAY OR FACT WITNESS TO REMAIN OUTSIDE THE COURTROOM DURING TRIAL)
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FILED

FEB 16 2023

ANGIE SPARKS, Clerk of District Court
By:  Deputy Clerk

2916

Plaintiffs recognize that, under the requirements of Rule 615 of the Montana Rules of Evidence, at the request of a party, this Court is required to exclude lay or fact witnesses who do not meet the Rule's exceptions. Specifically, "[t]he rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of a party's cause." M. R. Evid. 615. Montana's Rule 615 contains language identical to its federal counterpart. *See* Comm'n Comments to M. R. Evid. 615 (1976). Thus, federal interpretation has persuasive application to the Montana rule. *U.S. Fid. & Guar. Co. v. Rodgers*, 267 Mont. 178, 181-82, 882 P.2d 1037, 1039 (1994). The comments to Rule 615 note the trial court is given discretion in determining if an expert is essential enough to be covered by the third exclusion in the Rule. *See* Comm'n Comments to M. R. Evid. 615 (1976).

There will be three types of witnesses at the trial in this case:

1. **Youth Plaintiffs and their guardians named in the Complaint.** Under Rule 615, the Youth Plaintiffs and their guardians may not be excluded.
2. **Lay or fact witnesses.** Plaintiffs agree to exclude their non-plaintiff or guardian lay or fact witnesses. Of course, what is good for the goose is good for the gander. Thus, to the extent Defendants insist on exclusion under Rule 615, Defendants must designate "an officer or employee of a party which is not a natural person . . . as its representative by its attorney."¹ All other employees of Defendant the State of Montana will have to be excluded from the trial.

¹ A former officer or employee is not a valid representative under Rule 615(2), M.R. Evid. *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777.

3. **Expert witnesses disclosed by the Parties.** The Parties' expert witnesses who have submitted detailed reports setting forth their testimony and who have been deposed fall under the third exception in Rule 615, for "a person whose presence is shown by a party to be essential to the presentation of the party's cause." *See* Comm'n Comments to M. R. Evid. 615 (1976). As a practical matter, Plaintiffs anticipate that most of their expert witnesses will only be present during their testimony given the length of trial and scheduling constraints. That being said, the presence of some of Plaintiffs' expert and rebuttal witnesses could be deemed essential to the presentation of Plaintiffs' cause, as set forth more fully below.

To avail oneself of Rule 615(3), the party seeking an exception must only make a "fair showing" that the expert witness is in fact required for the management of the case. *United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002) (quoting *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 630 (6th Cir. 1978)). Expert witnesses may fall within the third exception of Rule 615. *U.S. v. Nosal*, No. CR-08-0237 EMC, 2013 WL 11327121 (N.D. Cal. March 29, 2013). The Ninth Circuit has recognized the Rule 615(3) burden constitutes a fairly low bar, particularly for expert witnesses that need to hear the testimony of factual witnesses in order to properly provide opinion evidence. *United States v. Seschillie*, 310 F.3d at 1214 ("[A]n expert who is not expected to testify to facts, but only assumes facts for purposes of rendering opinions, might just as well hear all of the trial testimony so as to be able to base his opinion on more accurate factual assumptions." (quoting *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 629 (4th Cir. 1996))).

Under M. R. Evid. 703, "[t]he facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." A permissible source of data for an expert is the firsthand observation of a witness. F.R.E.

703 Advisory Comm. Notes (1972 Proposed Rules). Some of Plaintiffs' expert witnesses, such as Drs. Lori and Robert Byron, Dr. Van Susteren, Dr. Running, Dr. Whitlock, and Mr. Durglo, are essential for purposes of Rule 615(3) because some of their testimony will be based on the testimony of the Plaintiffs, their guardians, and other fact witnesses. Further, having Drs. Lori and Robert Byron, Dr. Van Susteren, Dr. Running, Dr. Whitlock, and Mr. Durglo present in the courtroom will ensure that their testimony is not overlapping or cumulative, a concern already expressed by Defendants. *See* Def. Mot. *in Limine* No. 1. Some of Plaintiffs' rebuttal witnesses, including Dr. Running, Dr. Whitlock, Dr. Van Susteren, Dr. Trenberth, Mr. Haggerty, Dr. Jacobson, and Mr. Erickson, are essential because their presence and testimony are crucial to understand the testimony of, and to conduct cross-examination of, Defendants' expert witnesses. If any evidentiary disputes arise over the experts' competing testimony, their presence in the courtroom during other witnesses' testimony "could reduce the number and complexity of such disputes." *Jun Yu v. Idaho State Univ.*, No. 4:15-CV-00430-REB, 2019 WL 254240 (D. Idaho Jan. 17, 2019). In short, having these experts in the courtroom will reduce the risk of cumulative testimony and ensure streamlined rebuttal testimony. Thus, this Court should find Plaintiffs' expert and rebuttal witnesses Dr. Lori Byron, Dr. Robert Byron, Dr. Van Susteren, Dr. Running, Dr. Whitlock, Mr. Durglo, Dr. Trenberth, Mr. Haggerty, Dr. Jacobson, and Mr. Erickson are not subject to exclusion under Rule 615(3).

If the Court finds it appropriate to exclude any of Plaintiffs' expert witnesses, Defendants' expert witnesses should likewise be excluded, unless Defendants can demonstrate a reason for the witness to be in the courtroom, which Defendants did not do in Motion *in Limine* No. 6. And unlike Plaintiffs who have disclosed ten rebuttal experts, Defendants have only disclosed one rebuttal expert, Dr. Debra Sheppard. (Doc.242.)

Based on the foregoing, Plaintiffs believe the Court should issue the following order as to Defendants' Motion *in Limine* No. 6:

Upon the motion of Defendants pursuant to Rule 615, M. R. Evid., the Court orders witnesses excluded so they cannot hear other witnesses' testimony, except for the following witnesses:

1. The Youth Plaintiffs and their guardians named in the Complaint.
2. One current officer or employee of each Defendant who has been designated in writing served on opposing counsel prior to the commencement of trial as that party's representative by its attorney. All other employees of Defendant the State of Montana are excluded from the trial so that they cannot hear other witnesses' testimony.
3. Plaintiffs' expert and rebuttal witnesses, Dr. Lori Byron, Dr. Robert Byron, Dr. Van Susteren, Dr. Running, Dr. Whitlock, Mr. Durglo, Dr. Trenberth, Mr. Haggerty, Dr. Jacobson, and Mr. Erickson, and any other person whose presence a party shows to be essential to presenting the Party's claim or defense.

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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