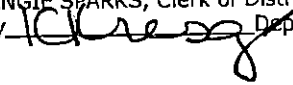


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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

<p>RIKKI HELD, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF MONTANA, et al.,</p> <p>Defendants.</p>	<p>Cause No. CDV-2020-307</p> <p>Hon. Kathy Seeley</p> <p>PLAINTIFFS' MOTION <i>IN LIMINE</i> NO. 6: REPLY BRIEF IN SUPPORT OF MOTION RE: ADMISSION INTO EVIDENCE OF THE PARTIES' EXPERT REPORTS</p>
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I. INTRODUCTION

It is difficult to understand why Defendants object to this motion *in limine* requesting the Court to declare that the Parties' Expert Reports shall not be excluded from evidence pursuant to the rule against hearsay and, conditional upon the resolution of any other evidentiary objections at trial, may be admitted into evidence. Defendants agree that pre-admission of the Parties' Expert Reports will "streamline the presentation of live testimony." Doc. 291 at 17. Also, Defendants do not contest the fairness of the procedure outlined by Plaintiffs: Before ruling that all Expert Reports will be admitted, the Court should consider whether the parties object to admitting the opposing side's expert reports on any grounds other than that the Expert Reports contain hearsay. The Court should direct counsel for the parties to meet and confer and file a joint status report indicating whether they stipulate to admission of all of the Parties' Expert Reports in evidence and, if they do not, explaining their reasons for objecting to this approach. Thus, notwithstanding Defendants' response, the Court should order that the Parties' Expert Reports, conditional upon the resolution of any other evidentiary objections at trial, may be admitted into evidence and all hearsay objections to those Expert Reports will be deemed denied.

II. ARGUMENT

A. **The Expert Reports Are Already Before the Court.**

Defendants' first objection appears to be that this motion seeks to "deluge the Court with expert witness reports." Doc. 291 at 16. By the time of trial, the Court will already be familiar with most of the Parties' Expert Reports. Defendants moved *in limine* to exclude testimony from Plaintiffs' experts Dr. Lori G. Byron, Dr. Robert Byron, Mr. Peter Erickson, Dr. Mark Jacobson, Dr. Steven Running, Dr. Jack Stanford, Dr. Lise Van Susteren, and Dr. Cathy Whitlock. Plaintiffs moved *in limine* to exclude testimony from Defendants' experts Dr. Judith Curry and Dr. Debra

Sheppard. Further, in opposing summary judgment, Plaintiffs relied on the reports, including the rebuttal reports, of each of their experts. These motions *in limine* and for summary judgment will require the Court to review the respective reports of these experts. Further, the Parties' Expert Reports are already in the Court's record.¹ In addition, both sides indicated through their proposed exhibit lists that they wish to offer their expert materials in evidence. *See* Defendants' Amended Exhibit List (Doc. 257, dated January 11, 2023). Thus, there will be no additional "deluge" of "expert witness reports" as the Parties' Expert Reports are already before and being considered by the Court.

B. Pre-Admission Will Streamline Presentation of Testimony.

While Defendants concede pre-admission of the Parties Expert Reports "might streamline the presentation of live testimony" in this bench trial, Defendants object as, without explanation, they want to limit the Court's consideration only to "live witness testimony" and "visual evidence." Doc. 291 at 17. Plaintiffs do not understand why Defendants object to streamlining the presentation of testimony. By their motion *in limine*, Plaintiffs were not requiring Defendants to waive any non-hearsay objections. Plaintiffs specifically request that, before ruling that the Parties' Expert Reports will be admitted, the Court should consider whether the Parties object to admitting the opposing side's Expert Reports on any grounds other than that the Expert Reports contain hearsay. Plaintiffs also ask the Court to direct counsel for the Parties to meet and confer and file a joint status report indicating whether they stipulate to admission of all of the Parties' Expert Reports in

¹ The Expert Reports are set forth in Plaintiffs' Expert Disclosures (Doc. 222, dated September 30, 2022); Defendants' Expert Witness Disclosure (Doc. 228, dated October 31, 2022), as amended by Defendants' Supplemental Expert Witness Disclosure (Doc. 236, dated November 22, 2022) and Defendants' Second Supplemental Expert Witness Disclosure (Doc. 249, dated January 3, 2023); Defendants' Rebuttal Expert Disclosure (Doc. 242, dated November 30, 2022); and Plaintiffs' Rebuttal Expert Disclosures (Doc. 240, dated November 30, 2022) (collectively, the "Parties' Expert Reports").

evidence and, if they do not, explaining their reasons for objecting to this approach. Defendants' response ignores these procedurally sound elements of Plaintiffs' motion *in limine*. Moreover, there are multiple procedures in place where objections can be stated to ensure consideration by the Court. The Exhibit List that is part of and appended to the Pre-Trial Order specifies each of the Parties' proposed exhibits and any objections thereto, and provides for documentation of the Court's ruling on the admissibility of each proffered exhibit. Trial memoranda, which provide a further opportunity to describe any evidentiary concerns, are required to be filed on or before the date of the final Pre-Trial Conference. Doc. 61 at 4. Further, Rule 8 of the Uniform District Court Rules provides:

Unless ordered otherwise, in all matters where the court must enter findings of fact and conclusions of law pursuant to M. R. Civ. P. 52, all parties shall file with the court, and serve upon all opposing parties, at least seven days prior to the scheduled trial or hearing, proposed findings of fact and conclusions of law.

In sum, there are procedural safeguards to ensure the Parties' substantive objections are heard and ruled on. With those safeguards in place, the admission of the Parties' Expert Reports will streamline and expedite consideration of the issues to be litigated at trial. Offering the substantive material in the Parties' Expert Reports into evidence through direct testimony by the experts will involve taking the additional time at trial to set out all of the foundational, methodological, and bibliographic matters that are central to the experts' various analyses. There is no serious doubt concerning the admissibility of these expert reports through other means. The Parties are represented by experienced counsel in this bench trial and requiring recreation of the contents of the Parties' Expert Reports through direct examination is unnecessary when the same effect may be achieved by simply admitting the reports into evidence, subject to other objections. As the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding," M. R. Civ. P. 1, Plaintiffs' Motion *in Limine* No.

6 should be granted, and the Court allow the Parties' Expert Reports into evidence subject to ruling on objections made by counsel.

C. The Residual Hearsay Exception Permits Admission of the Expert Reports.

Defendants' third objection in their response refers to the residual hearsay exception in Rule 803(24), M. R. Evid.² Doc. 291 at 17. Defendants agree with Plaintiffs' citation to *Matter of C.K.*, 2017 MT 69, 387 Mont. 127, 391 P.3d 735, as well as citing additional authority applying the residual hearsay exception to expert testimony, *State v. S.T.M.*, 2003 MT 221, 317 Mont. 159, 75 P.3d 1257; *State v. Osborne*, 1999 MT 149, 295 Mont. 54, 982 P.2d 1045; and *State v. Mayes*, 251 Mont. 358, 825 P.2d 1196 (1992). These cases acknowledge the residual hearsay exception permits the Court wide discretion to admit the Parties' Expert Reports. The residual hearsay exception applies here because the statements and opinions contained in the Parties' Expert Reports are corroborated by sufficient guarantees of trustworthiness and are more probative on the points for which they are offered than any other evidence.

The only case cited in opposition by Defendants is *Marsee v. United States Tobacco Co.*, 866 F.2d 319 (10th Cir. 1989). Defendants' only reference to *Marsee* is to quote the following language: "Since these reports merely repeated a great deal of other material introduced into evidence, the ends of justice did not require the admission of these reports. This is particularly true in view of the fact that much of the information contained in these reports was otherwise admitted into evidence through expert witness testimony." *Id.* at 325. The problem with the referenced section of this Tenth Circuit opinion is that the "reports" referenced in the quote are not expert

² M. R. Evid. 803. Hearsay Exceptions: Availability of Declarant Immaterial. "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."

reports, but two published reports, the report of the International Agency for Research on Cancer and the report of the Consensus Development Conference of the National Institute of Health (collectively, the “published reports”), offered on the issue of causation. *Id.* The Tenth Circuit held that the trial court properly determined to exclude the published reports both because the published “reports merely repeated a great deal of other material introduced into evidence” and because the trial court had permitted Plaintiff’s lawyers to have “numerous witnesses read significant portions of the [published] reports to the jury.” *Id.* Also, during “the cross-examination of several defense witnesses, counsel read selected portions of the [published] reports and asked if the witness agreed. Finally, many of the articles reviewed in the [published] reports were received into evidence as exhibits.” *Id.* Thus, Defendants’ quoted portions from the decision in *Marsee* bear no relationship to the admission of the Parties’ Expert Reports.

D. Defendants’ Opposition Fails to Address M. R. Evid. 703.

Plaintiffs argued Rule 703 of the Montana Rules of Evidence authorizes experts to present opinions based on inadmissible facts or data. Based on the authorities cited by Plaintiffs, which Defendants do not dispute, Rule 703 permits hearsay or other inadmissible evidence upon which an expert properly relies to be admitted explaining the basis of the expert’s opinion, upon a foundational showing that the information is of a type reasonably relied upon by experts in the field of expertise.

The Parties’ Expert Reports provide the Court with background, context, and industry knowledge that are traditionally supplied by experts. Admission of these reports along with the trial testimony of each expert will help explain the complex issues and data presented by the experts to the Court in a comprehensible manner. In circumstances where “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine

a fact in issue,” M.R. Evid. 702 permits an expert to offer testimony “thereto in the form of an opinion or otherwise,” M. R. Evid. 702, after the Court makes a threshold determination as to whether “the subject matter requires expert testimony,” and “the witness qualifies as an expert in the particular area on which the witness intends to testify.” *State v. Harris*, 2008 MT 213, ¶ 8, 344 Mont. 208, 186 P.3d 1263. Admission will allow the Court to make a more informed decision with respect to the weight and reliability of the evidence contained within the Parties’ Expert Reports. Accordingly, the Court should exercise its discretion to declare that rule against hearsay is no bar to the admission of the Parties’ Expert Reports into evidence.

III. CONCLUSION

Plaintiffs’ motion *in limine* seeks to resolve this important issue in advance of final trial preparation, including the efficient design of the direct examination of expert witnesses, the submittal of exhibit lists, and to otherwise facilitate the parties’ preparation for trial. Thus, the order requested by Plaintiffs asks that the Parties’ Expert Reports, conditional upon the resolution of any other evidentiary objections at trial, may be admitted into evidence and all hearsay objections to those Expert Reports will be deemed denied. Further, before ruling that all Expert Reports will be admitted, however, Plaintiffs request the Court consider whether the parties object to admitting the opposing side’s expert reports on grounds other than hearsay. The Court should direct counsel for the parties to meet and confer and file a joint status report indicating whether they stipulate to admission of all of the Parties’ Expert Reports in evidence and, if they do not, explaining their reasons for objecting to this approach.

DATED this 28th day of February, 2023.

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