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**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 MOTIONS
IN LIMINE**

Before the Court are the parties' motions *in limine* (MILs). Youth Plaintiffs filed seven MILs, and the Court ruled on MIL No. 1 on Feb. 2, 2023. Plaintiffs' MIL Nos. 2-6 are opposed by the State and will be addressed in turn. Plaintiffs' MIL No. 7 is not opposed by the State, but there is a dispute over authenticating agency documents. The State presents seven MILs. The State's MILs Nos. 5 and 7 are unopposed by Plaintiffs and will therefore be granted. The State's remaining MILs will be addressed after Plaintiffs'.

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1 **Plaintiffs’ MIL No. 2: Remote Testimony of Dr. Trenberth.**

2 The State does not oppose remote testimony for Dr. Trenberth
3 because of his medical condition, but other witnesses will not be allowed to
4 testify remotely unless the moving party shows good cause. This motion will be
5 granted.

6 **Plaintiffs’ MIL No. 3: Limit Scope of Hybrid and 30(b)(6) Witness to**
7 **Testimony Given in Depositions.**

8 Plaintiffs’ MIL No. 3 seeks to limit the testimony of State’s Hybrid
9 Experts Dave Klemp and Sonja Nowakowski to opinions expressed in their
10 depositions, to eliminate surprise and promote effective cross-examination of the
11 witnesses.

12 The State argues that it disclosed the identity of the hybrid
13 witnesses and the scope of their testimony as best it could, given the broad
14 framing of Plaintiffs’ deposition notices and questioning.

15 The Court agrees with the State that Plaintiffs could have asked
16 more specific questions in the depositions. The witnesses will be allowed to
17 testify on matters regarding which they indicated, for example, that their
18 testimony “would depend on the question that was asked.” Nowakowski Dep.
19 28:4-12.

20 However, the Court also agrees with Plaintiffs that developing an
21 opinion in preparation for trial would make a hybrid witness a retained expert
22 witness subject to the disclosure requirements of Mont. R. Civ. P. 26(b)(4).
23 Therefore, the hybrid witnesses will not be allowed to opine on matters regarding
24 which they said they had no opinion or “can’t answer that.” Klemp Dep. 103:11-
25 20.

1 Plaintiffs also move to limit the testimony of the State’s agency
2 designees to the testimony given during their depositions because the witnesses
3 expressed varying degrees of knowledge or lack of knowledge on various
4 deposition topics. The State argues that Plaintiffs’ deposition notices were overly
5 broad and that “it would literally take a large portion of DEQ staff to cover the
6 topics listed.” Defs.’ Comb. Br. Opp. Mot. Limine at 9.

7 Designated representatives must testify about “information known
8 or reasonably available” to the agency. Mont. R. Civ. P 30(b)(6). Even if a
9 witness testifies differently than in deposition, that testimony must be based on
10 information that was discoverable by Plaintiffs. Plaintiffs may also cross-
11 examine witnesses as to why they were unable to offer that testimony during their
12 depositions. This motion will be granted in part and denied in part as set forth
13 above.

14 **Plaintiffs’ MIL No. 4: Limit rebuttal expert testimony of Dr. Sheppard.**

15 Dr. Sheppard was retained to critique the methodology of Dr. Van
16 Susteren. Plaintiffs argue that, because Dr. Sheppard lacks expertise concerning
17 the mental health impacts of climate change, she should not be allowed to opine
18 on the methodology Dr. Van Susteren used to formulate her expert opinions. The
19 Court disagrees.

20 The Court ruled that Plaintiffs’ mental health was not genuinely at
21 issue in this case. Order on Motion Under Rule 35(a) for IMEs at 3-6. That ruling
22 was made in part because Dr. Van Susteren had not formally diagnosed
23 Plaintiffs. Dr. Van Susteren’s findings were reported as case studies or profiles,
24 and they are not so esoteric as to require specialized training to evaluate them.
25 Dr. Sheppard has the requisite education and experience as a

1 neuropsychologist to comment on Dr. Van Susteren’s psychological evaluations
2 and whether Dr. Van Susteren utilized a reliable methodology to reach her
3 conclusions. This motion will therefore be denied.

4 **Plaintiffs’ MIL No. 5: Exclude expert opinions of Dr. Curry.**

5 Plaintiffs’ MIL No. 5 seeks to exclude and/or limit the scope of Dr.
6 Curry’s expert testimony to climate science—that for which she has the requisite
7 “knowledge, skill, experience, training, or education.” Mont. R. Evid. 702. Dr.
8 Curry’s report discusses scientific topics such as weather, fossil fuels, GHGs, and
9 renewable energy sources, but it also contains commentary on media and mental
10 health.

11 Dr. Curry is qualified to opine on climate science and renewable
12 energy. But she is not qualified to “proffer[] testimony as a historian of the
13 climate change debate,” or opine about mental health. *Mann v. Nat’l Review,*
14 *Inc., et al.*, 2012 CA 008263 B (DC Superior Ct.) at 12. She may offer opinions
15 about the accuracy of media coverage of climate science, but not the mental
16 impacts on Plaintiffs or others.

17 The section of Dr. Curry’s report on climate change rhetoric and
18 mental health goes beyond her “knowledge, skill, experience, training, or
19 education.” Mont. R. Evid. 702. At trial, the Court will necessarily determine the
20 reliability of Dr. Curry’s methodology in reaching her scientific opinions. This
21 motion is granted in part and denied in part.

22 **Plaintiffs’ MIL No. 6: Stipulate to admission of expert reports unless there**
23 **are objections besides hearsay.**

24 Plaintiffs’ MIL No. 6 seeks a broad ruling that expert reports of the
25 parties will not be excluded on hearsay grounds. This is a bench trial and

1 Plaintiffs are correct that typical inadmissibility concerns are diminished, but the
2 State is also correct that these experts will testify at trial and a trial-by-report will
3 put an unnecessary burden on the Court. While many of the expert reports may
4 be admitted into evidence, the Court will not broadly suspend the hearsay rules
5 regarding expert reports. This motion will be denied.

6 **Plaintiffs’ MIL No. 7: Stipulate to the authenticity and foundation of select**
7 **documents.**

8 Plaintiffs’ MIL No. 7 seeks an order deeming that more than 150
9 proposed exhibits have the proper authentication and foundation to be admissible
10 at trial. According to Plaintiffs’ Appendix A, attached to the MIL, the State has
11 stipulated to the authenticity and foundation of about 30 of the proposed exhibits.
12 Pls.’ Mot. *In Limine* No. 7 Appendix A. Plaintiffs now state that the State has yet
13 “to authenticate a single document listed in Appendix A.” Pls.’ Mot. *In Limine*
14 No. 7: Second Notice of Submittal at 2.

15 In emails between the parties and during the final pre-trial
16 conference on April 27, 2023, the State represented that it was not opposed to
17 stipulating to authenticity and foundation for these documents but was burdened
18 by the volume and scope of Plaintiffs’ request. The State indicated it would
19 “have those worked through” by the June 12, 2023, trial. *Id.* (quoting Transcript
20 of Final Pre-Trial Conference at 8:1-5 (April 27, 2023)). It is now unclear what
21 the State intends.

22 It may be necessary to establish at trial the authenticity or
23 foundation of documents Plaintiffs offer as evidence. However, the Court also
24 admonishes the State not to unreasonably contest foundation/authenticity if

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1 they are relatively clear. The Court declines to broadly order that the documents
2 in Appendix A are authenticated and have proper foundation. This motion will be
3 denied.

4 **State’s MIL No. 1: Preclude cumulative expert witness testimony.**

5 State’s MIL No. 1 seeks to preclude redundant expert testimony.
6 The State points to portions of Plaintiffs’ Expert Witness Disclosures that involve
7 general information about GHGs, climate change, and the impacts. At the request
8 of a party or on its own, the Court will intervene if offered testimony becomes
9 too cumulative. See Mont. R. Evid. 403. This motion will be granted, but specific
10 objection will be required if a party believes testimony has become unduly
11 repetitive.

12 **State’s MIL No. 2: Preclude irrelevant expert witness testimony.**

13 State’s MIL No. 2 seeks to exclude irrelevant testimony,
14 specifically Dr. Jacobson’s anticipated testimony about renewable energy and Dr.
15 Van Susteren’s testimony about climate change and mental health. Evidence
16 must be relevant to be admissible. Mont. R. Evid. 402. Evidence is relevant if it
17 is probative of a material fact. Mont. R. Evid. 401.

18 Testimony about renewable energy and the feasibility of Montana
19 shifting away from fossil fuels is relevant to the strict scrutiny analysis and will
20 be allowed. Both parties have experts who will offer opinions on the feasibility of
21 transitioning to renewables, and they may be presented.

22 While Dr. Van Susteren’s testimony is relevant to Plaintiffs’
23 standing and equal protection claim, the Court agrees with the State that
24 “Plaintiffs’ mental health is not really and genuinely in controversy.” Order on
25 Motion Under Rule 35(a) for IMEs at 3-6. Factors that support allowing Dr. Van

1 Susteren’s testimony include the fact that this is a bench trial, and that Plaintiffs
2 are not seeking damages for specific mental or emotional injuries. The Court can
3 hear Dr. Van Susteren’s testimony without risk of confusion or prejudice.

4 While the Court finds Plaintiffs’ alleged mental and emotional
5 distress relevant, the Court will not accept testimony from Dr. Van Susteren that
6 goes beyond the distress contemplated in the Order on Motion Under Rule 35(a)
7 for IMEs. This is not precisely a relevance issue, but the Court is nonetheless
8 wary of the scope of Dr. Van Susteren’s proposed testimony.

9 This motion is denied, but the Court recognizes Plaintiffs’ need to
10 tailor Dr. Van Susteren’s testimony.

11 **State’s MIL No. 3: Preclude evidence, allegations, or testimony relating to**
12 **claims or legal theories Plaintiffs did not plead in the complaint.**

13 This motion is too vague to be meaningful whether granted or
14 denied. Specific objection will be required. The motion is denied.

15 **State’s MIL No. 4: Preclude any witness not qualified or properly**
16 **designated as an expert from offering opinions on highly technical matters.**

17 This motion is also vague because it does not offer any testimony
18 at issue. Non-expert witnesses will not be allowed to offer highly technical
19 opinions. The State may choose to voir dire a witness if it believes the witness is
20 offering an expert opinion on a “highly technical matter”. This motion will be
21 granted.

22 **State’s MIL No. 6: Lay or fact witnesses excluded until after testimony.**

23 Mont. R. Evid. 615 provides that witnesses must be excluded at a
24 party’s request. The motion will be granted. The parties should instruct fact
25 or lay witnesses to refrain from talking to each other or watching live streams of
the proceedings.

1 **ORDER**

2 Based on the foregoing, **IT IS ORDERED:**

- 3 1. Plaintiffs’ MIL No. 2 is **GRANTED**.
4 2. Plaintiffs’ MILs Nos. 3 and 5 are **GRANTED IN PART,**
5 **DENIED IN PART**.
6 3. Plaintiffs’ MIL Nos. 4, 6, 7 are **DENIED**.
7 4. State’s MILs Nos. 1, 4, 5, 6, and 7 are **GRANTED**.
8 5. State’s MILs Nos. 2 and 3 are **DENIED**.

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10 **ELECTRONICALLY SIGNED BELOW**

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KS/sm/CDV-2020-307 Ord Motions in Limine