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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 **BRIEF IN OPPOSITION TO MOTION FOR RECONSIDERATION TO ADMIT THE EXPERT REPORTS OF STEVEN W. RUNNING AND CATHY WHITLOCK**

INTRODUCTION

In the middle of trial—despite the Court already denying a nearly identical motion *in limine,* Plaintiffs again attempt to impose on the Court the "trial-by-report" the Court rejected in denying Plaintiffs' Motion in Limine No. 6. (Doc. 381 at 5.) After hours of live expert testimony,

in which the experts discussed the opinions and conclusions stated in their reports, Plaintiffs nonetheless request suspension of the rule against hearsay to admit expert witness reports into evidence—a request already denied by this Court. And Plaintiffs have already put on this expert evidence through testimony, including PowerPoint presentations of studies and other materials from the reports, as well as questioning from Plaintiffs' counsel in which counsel read direct quotes from various studies and reports and then asked the witness to comment on these quotes. Not only would the admission of Dr. Running and Whitlock's reports violate the rule against hearsay and this Court's prior ruling on Plaintiff's Motion in Limine No. 6, but it would also be cumulative. Further, motions for reconsideration are improper under the Rules of Civil Procedure. Plaintiffs' Motion for Reconsideration should be denied.

ARGUMENT

I. MOTIONS FOR RECONSIDERATION ARE NOT PROPER UNDER THE RULES OF CIVIL PROCEDURE.

A motion for reconsideration is neither provided for nor authorized under the Montana Rules of Civil Procedure. Therefore, a motion for reconsideration has no effect unless the court equates it to another type of motion which is allowed under the Rules. *ABC Collectors, Inc. v. Birnel*, 2006 MT 148, ¶ 14, 332 Mont. 410, 138 P.3d 802. Since they are not provided for in the rules of civil procedure, "motions for reconsideration present a procedural trap for the unwary." *Nelson v. Driscoll*, 285 Mont. 355, 359–360, 948 P.2d 256, 259 (1997). Motions for reconsideration are disfavored, and this Court should not entertain Plaintiff's Motion, which fails to identify itself as a permissible motion under the Rules. Plaintiffs point to no authority under which this Court should reconsider their already denied Motion in Limine.

Plaintiffs fail to articulate what type of motion their "Motion for Reconsideration" is that would make it permissible under the Montana Rules of Civil Procedure. Instead, they merely

repeat the arguments this Court already rejected in denying Plaintiffs' Motion in Limine No. 6. And Plaintiffs twist this Court's Order on that Motion to suggest that this Court actually *is* inclined to admit expert reports into evidence, in violation of the hearsay rule, and not what this Court's ruling on Plaintiff's Motion in Limine No. 6 actually said. A quote from that Order is instructive:

> "…the State is also correct that these experts will testify at trial and a trial-by-report will put an unnecessary burden on the Court."

(Doc. 381 at 5.) This Court should uphold the rules of evidence and civil procedure and deny the motion to admit the expert reports of Dr. Running and Dr. Whitlock. There is no prejudice to Plaintiffs because they have introduced lengthy live testimony of these witnesses as well as accompanying quotes from studies and reports, and visual exhibits. Denial is proper.

II. THE EXPERT REPORTS ARE INADMISSIBLE HEARSAY.

Plaintiffs argue that the rule against hearsay should be overlooked for these expert reports because their authors testified at trial and the report has "comparable circumstantial guarantees of trustworthiness," and in the alternative, that the report is not offered for the truth of the matter, but rather as a "useful reference tool and context for the Court to Drs. Running and Whitlock's live testimony." (Pls. Mot. for Reconsideration at 1–2.) The Court previously rejected Plaintiffs' arguments that these reports were not hearsay. The Court has already heard hours of testimony from Dr. Running and Dr. Whitlock—accompanied by voluminous quotes and visual exhibits from the witnesses' report. The Court does not need an admissible "useful reference tool." This is simply Plaintiffs' rebranding of the "trial-by-report" that this Court already denied in motions *in limine* as an "unnecessary burden on the Court." (Doc. 381 at 4–5.) Revisiting Plaintiffs' request to admit this hearsay evidence violates the rules of civil procedure and evidence and does not serve the interests of justice. As this Court told Plaintiffs in its Order on Motions in Limine, "the Court will not broadly suspend the hearsay rules regarding expert reports." (Doc. 381 at 5.)

Plaintiffs also argue that the expert reports should be admitted under the so-called "residual hearsay exception" of Mont. R. Evid. 803(24), Mont. R. Evid. (Doc. 270 at 8.) The Rule states:

> ***Other Exceptions.*** A statement not specifically covered by this Rule if:
> (A) the statement has equivalent circumstantial guarantees of trustworthiness;
> (B) it is offered as evidence of a material fact;
> (C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;
> (D) admitting it will best serve the purposes of these rules and the interests of justice; and
> (E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Plaintiffs attempt to explain how expert witness reports meet these criteria, but these arguments are unavailing. Namely, the hearsay reports are not more probative than the experts' actual testimony, admitting them will not serve the interests of justice, and Plaintiffs' request was already denied by this Court. The cases cited by Plaintiffs are inapposite here, where live expert testimony was available and taken. Plaintiffs do not seek the application of the residual hearsay rule to admit statements made by others to their experts; rather, they seek to apply the rule to their own expert reports, which are other statements made by Plaintiffs' experts themselves at another time while not on the witness stand.

These circumstances are similar to *Marsee v. United States Tobacco Co*., 866 F.2d 319 (10th Cir. 1989), a lawsuit alleging that tobacco snuff caused oral cancer, in which reports of cancer research and other health information were deemed inadmissible hearsay because the information in the reports was quoted or discussed by expert witnesses at trial. *Marsee*, 866 F.2d at 325 "(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.") Simply put, Plaintiffs have made no showing of a hearsay exception (including the residual hearsay exception) that would support admission of the Running and Whitlock expert reports in this case, especially where the Court has already ruled the reports are inadmissible hearsay and admitting them would place an unnecessary burden on the Court. Plaintiffs' Motion should be denied.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' Motion for Reconsideration and exclude from evidence the expert reports of Dr. Running and Dr. Whitlock.

DATED this 14th day of June, 2023.

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