IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0575

RIKKI HELD, et al.,

Plaintiffs / Appellees

v.

STATE OF MONTANA, et al.,

Defendants / Appellants

MONTANA TRIAL LAWYERS ASSOCIATION *AMICUS CURIAE* BRIEF

On Appeal From the Montana First Judicial District Court, Lewis and Clark County, Cause No. CDV 2020-307, the Honorable Kathy Seeley, Presiding

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STATEMENT OF INTEREST

Montana Trial Lawyers Association ("MTLA") represents approximately 500 Montana attorneys who represent litigants in Montana courts. MTLA attorneys work to secure just results for the injured, the accused, and those whose rights are jeopardized. MTLA's goals include upholding and defending the constitutions of Montana and the United States, improving the adversary system, and upholding the just resolution of disputes by trial.

MTLA's participation in this case focuses on the importance of: (1) trial for resolving factual disputes; and (2) maintaining the constraints on Montana Rule of Civil Procedure 35—a Rule that the Court recognizes as "the most intrusive and, therefore, the most limited discovery tool." *Simms v. Eighteenth Jud. Dist. Ct.*, 2003 MT 89, ¶ 29, 315 Mont. 135, 68 P.3d 678.

SUMMARY OF ARGUMENT

Sixteen Montana kids challenged state laws that undermine their fundamental rights, including the right to a clean and healthful environment. After a seven-day trial, the trial court issued 289 detailed findings of fact. Centrally, the trial court determined that Montana Code Annotated § 75-1-201(2)(a), prohibiting state agencies from analyzing greenhouse gas ("GHG") pollution and climate change impacts during environmental reviews done pursuant to the Montana Environmental Policy Act ("MEPA"), makes it impossible for Defendants to make informed and

constitutionally compliant permitting decisions. Doc. 405 at 9–101. The trial evidence established that Defendants' uninformed permitting of fossil-fuel-related projects increased Montana's GHG emissions, which contributed to the Plaintiffs' ongoing injuries and violated Plaintiffs' constitutional rights. *Id.* Likewise, the trial court determined that § 75-1-201(6)(a)(ii), which prohibits courts from vacating or enjoining agency decisions based on inadequate agency review of GHG emissions or climate change, is facially unconstitutional because it vitiates litigants' remedies that would otherwise uphold the preventive mandates of Montana Constitutional Article IX. *Id.* at 91–92.

Through pretrial motions, Defendants asserted a number of impediments to Plaintiffs' vindication of their fundamental rights. Primarily, Defendants focused on whether Plaintiffs suffered injuries necessary to establish standing. Plaintiffs responded with citation to the substantial discovery record, depositions, expert reports, and affidavits. The lower court consequently determined that a number of material facts remained in dispute, necessitating resolution by trial. *See* Doc. 379 at 5–6.

The district court was right. Plaintiffs' cognizable injuries include mental health injuries, which plainly establish standing necessary to redress constitutional injuries. Nevertheless, pursuant to Montana Rule of Civil Procedure 35(a), Defendants sought psychological examinations of eight Plaintiffs to perform testing under DSM-5-TR,

and to intrude upon matters that are irrelevant to this case. *See* Doc. 173, at 2–3. Further, while most Plaintiffs to be examined were minors at the time, their parents would have been prohibited from attending the examination. *Id.* at 4.

The District Court appropriately exercised its discretion when it denied Defendants' demand. Relying upon the multiple forms of harm alleged by Plaintiffs in support of standing, and in the absence of formal diagnoses or monetary damages claimed by Plaintiffs regarding the emotional harms in this case, the District Court determined that the Plaintiffs' mental health was not genuinely in controversy. Further, the trial court determined that the sweeping psychological examinations requested by Defendants were too broad in scope and constituted a fishing expedition.

No dispute exists that Montana law requires the clearing of a high bar before a Rule 35 examination is ordered. A defendant must affirmatively show that the condition at issue is in controversy, and that good cause exists for the examination being sought. In addition, the district court must balance the defendant's need for this discovery against the plaintiff's constitutional right of privacy. The invasive nature of psychological examinations, in particular, jeopardize the right to privacy. Especially when alternatives exist to an unnecessary or even potentially harmful Rule 35 examination, a plaintiff's privacy rights must be carefully guarded. MTLA urges the Court to maintain and affirm the high, "discriminating application" standard imposed

before a defendant can subject injured people to invasive, potentially harmful exams under Rule 35.

ARGUMENT

I. Our adversarial system of justice is predicated on resolution of disputed facts through trial.

The right to prove contested facts at trial is no less robust for litigants seeking declaratory judgments and constitutional redress, than for claimants pursuing monetary damages. Article II, Section 16 of the Montana Constitution guarantees that "[c]ourts of justice shall be open to every person . . . and that *no person* should be deprived of this full legal redress for injury [.]" *See, e.g., McLaughlin v. Montana State Legislature*, 2021 MT 120, ¶ 10, 404 Mont. 166, 489 P.3d 482, 486 (emphasis added).

Here, consistent with a body of well-established law protecting the right to trial, the district court appropriately preserved disputed factual issues for full evidentiary presentation, consideration, and resolution, rather than improperly resolving them pretrial and in summary fashion. *See, e.g., Clark v. Eagle Sys., Inc.*, 279 Mont. 279, 283, 927 P.2d 995, 997 (1996) ("Summary judgment is an extreme remedy and should never be substituted for a trial if a material fact controversy exists.") (citations omitted); *Cossitt v. Flathead Indus., Inc.*, 2018 MT 156, ¶ 9, 391 Mont. 156, 415 P.3d 486 ("Dismissal of a pleading for failure to state a claim should occur only "if it appears 'beyond doubt' the plaintiff can 'prove no set of facts in

support of his claim that would entitle him to relief.'") (quoting *Jones v. Montana Univ. Sys.*, 2007 MT 82, ¶ 15, 337 Mon. 1, 155 P.3d 1247).

The factual disputes inappropriate for summary resolution were evident from the outset of this case. Notwithstanding detailed factual assertions set forth in Plaintiffs' complaint, for example, Defendants denied virtually all actionable assertions. *Compare* Doc.1, *with* Doc. 54. Thereafter, the District Court denied motions for summary resolution, given the disputed facts adduced through comprehensive discovery, and the case proceeded appropriately to a full trial. There, the trial court found the witnesses called by Plaintiffs to be qualified, credible, and informative. *See, e.g.*, Doc. 405 at FOF #65 (Dr. Steve Running), #66 (Dr. Cathy Whitlock), #101 (Dr. Lori Byron), #102 (Dr. Lise Van Susteren), #103 (Mr. Michael Durglo, Jr.), #151 (Dr. Dan Fagre), #162 (Dr. Jack Stanford), #209 (Ms. Anne Hedges), #210 (Mr. Peter Erickson), #269 (Dr. Mark Jacobson), and #208 ("The testimony of the Youth Plaintiffs and their guardian was credible and undisputed"). Conversely, the trial court found the testimony of the *only* expert called by Defendants, Dr. Terry Anderson, to be "not well supported, contained errors, and was not given weight by the Court." Doc. 405 at FOF #211.

Indeed, in a case similar to this one, this Court noted the fundamental importance of resolving factual questions at the trial court level. *Barhaugh v. State*, No. OP 11-0258 (Mont. June 15, 2011). There, in an original proceeding, the

plaintiffs sought declaratory relief based upon the State's failures regarding greenhouse gas emissions and their effects on climate change. Ultimately, the Court decided that it could not exercise original jurisdiction, and held that Plaintiffs' claim "does not involve purely legal questions," explaining:

> As the State points out, the petition incorporates factual claims such as that the State "has been prevented by the Legislature from taking any action to regulate [greenhouse gas] emissions[.]" The State posits that the relief requested by Petitioners would require numerous other factual determinations, such as the role of Montana in the global problem of climate change and how emissions created in Montana ultimately affect Montana's climate.

Id. at *2.

The Plaintiffs followed the appropriate path in this case. And given the existence of disputed material facts, the District Court properly protected Plaintiffs' fundamental trial right.

II. The District Court appropriately exercised its discretion in denying Defendants' request for Rule 35 psychological examinations.

"[A] compelled medical exam is the most intrusive and, therefore, the most limited discovery tool." *Simms*, 2003 MT 89, ¶ 29 (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)). Accordingly, this Court prescribes a strict balancing test before a defendant's demand for a Rule 35 medical examination can be granted.

> In Montana, the request for an ordered independent medical examination must be weighed against the right to privacy provided for at Article II, Section 10 of the Montana Constitution and the right to

> safety, health and happiness provided for at Article II, Section 3 of the Montana Constitution. When a proposed examination risks unnecessary, painful or harmful procedures the scale must favor protecting the individual's rights.

Simms, ¶ 32 (emphasis added); *see also Lewis v. Eighth Judicial Dist. Ct.*, 2012 MT 200, ¶ 6, 366 Mont. 217, 286 P.3d 577 ("A defendant's need for discovery of a plaintiff's mental or physical condition under M.R. Civ. P. 35 must be balanced against the plaintiff's constitutional right to privacy"); *accord Winslow v. Montana Rail Link, Inc.*, 2001 MT 269, ¶ 5, 307 Mont. 269, 38 P.3d 148.

Montana Rule of Civil Procedure 35 states in relevant part:

> When the mental or physical condition . . . of a party . . . is in controversy, the court . . . may order the party to submit to a physical or mental examination . . .. The order may be made only on motion for good cause shown . . .

Mont. R. Civ. P. 35(a).

The United States Supreme Court determined in *Schlagenhauf* that the "in controversy" and "good cause" elements found in the Rule's federal analogue are not "a mere formality." 379 U.S. at 118. Instead, the Rule requires "an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Id.* Montana is no different. Quoting *Schlagenhauf*, the Montana Supreme Court stated:

> Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the

> party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause' . . .

Simms, ¶ 30. Further, Montana courts apply a "high standard for the 'in controversy' and 'good cause' requirements of Rule 35." *Lewis*, ¶ 7.

Here, the Court must decide if the District Court abused its discretion when it denied Defendants' Rule 35 demand for two-hour psychological examinations of eight young Plaintiffs, involving testing under the DSM-5-TR and intrusion into matters irrelevant to this constitutional climate case, such as Plaintiffs' alcohol and drug use, and exposure to childhood trauma. *See Pumphrey v. Empire Lath & Plaster*, 2006 MT 99, ¶ 16, 332 Mont. 116, 135 P.3d 797 (abuse of discretion standard applies to Rule 35 determinations). The answer is plainly no.

A. Montana law supports the District Court's determination that Plaintiffs' mental health was not really and genuinely in controversy for purposes of Rule 35.

Consistent with the "high standard" that must be met before a Rule 35 exam can be compelled, the District Court properly decided that the examinations Defendants sought were unwarranted by the claims in this case. *See* Doc. 225.

It bears emphasis at the outset that Plaintiffs did not make any claims for damages based on emotional distress. But even if emotional distress damages were at issue, this Court has previously rejected the notion that Rule 35 examinations are presumptively appropriate:

> We have never ruled that a plaintiff's claim for emotional distress damages is, in and of itself, a sufficient basis for ordering a Rule 35 mental examination.

Lewis, ¶ 8.[1]

Next, the Court should reject Defendants' framing of Plaintiffs' mental health as "squarely" at the center of this case. *See generally* Doc. 225 at 3–6, District Court's October 14, 2022, Order on Motion Under Rule 35(a) for Independent[2] Medical Examinations ("Rule 35 Order"); Defendants' Brief, III.A. But Plaintiffs' references to emotional harms are far from central, but rather are among many the injuries Plaintiffs cite in support of the limited standing issue. *See generally* Plaintiffs'/Appellees' Answer Brief at 72 (quoting *Gryczan v. State*, 283 Mont. 433, 446, 942 P.2d 112). Indeed, Defendants do not dispute that discovery sought under Rule 35 goes solely to the issue of standing. *See* Doc. 225 at 3 (quoting Defendants, "'[t]he 'issue of standing may very well turn on' the psychological component of Plaintiffs' alleged injuries.").

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[1] The *Lewis* Court reversed the district court's order allowing a Rule 35 mental examination, because the plaintiff had not put her mental condition in controversy by making "only a general claim for 'emotional pain, suffering and anxiety' associated with her physical injuries." *Lewis*, ¶¶ 9–10.

[2] The Court should reject, or at least not encourage, the characterization of Rule 35 examinations as "Independent Medical Exams" or "IMEs." Rule 35 does not modify exams thereunder as "independent," nor did the United States Supreme Court in *Schlagenhauf*.

The Court should deny Defendants' effort use the intrusive nature of Rule 35 examinations, in a case where no emotional distress damages are claimed, to purportedly resolve the threshold issue of standing. As reflected in Montana's existing jurisprudence—with respect to both standing and Rule 35 examinations, alike—parties do not need and should not now be permitted intrusive examinations and expert medical opinions to address whether standing exists.

Appropriately, the District Court examined many factors in assessing whether Plaintiffs' emotional distress was actually in controversy to warrant the demanded psychological examinations. This included whether the report of Plaintiffs' expert (Dr. Van Susteren) brought the Plaintiffs' mental health into real and genuine controversy, notwithstanding that Plaintiffs were undisputedly not pursuing emotional distress damages. Quoting from a case relied upon by Defendants, the District Court explained:

> "emotional distress" is not synonymous with the term "mental injury" as used by the Supreme Court in *Schlagenhauf v. Holder* for purposes of ordering a mental examination . . .. If this were the law, then mental examinations could be ordered whenever a plaintiff claimed emotional distress or mental anguish. Rule 35(a) was not meant to be applied in so broad a fashion.

Doc. 225 at 4–5 (quoting *Turner v. Imperial Stores*, 161 F.R.D. 89, 97 (S.D. Cal. 1995). In short, more than the mere mention of "emotional harm" should be required before an intrusive Rule 35 examination is compelled.

Ultimately, the District Court pointed to Plaintiffs' allegations of "economic, physical health, aesthetic, and recreational injuries" in support of their standing claim to reject the Defendants' assertion that Plaintiffs' mental health is at the center of this case. Doc. 225 at 6. The District Court properly considered Defendants' claims regarding Plaintiffs' expert, noting that a future evidentiary challenge might be well received but that the desired "swath of [examinations] for eight Plaintiffs" was not warranted. *Id.* In short, no evidence exists in the record that the District Court abused its discretion when it found that Defendants had not met the high standard to show that Plaintiffs' mental health is really and genuinely in controversy.

B. The District Court properly scrutinized Defendants' Rule 35 requests and appropriately determined that on balance, good cause did not exist for the requested psychological examinations.

There is no dispute that Rule 35's "good cause" requirement demands a showing of need exceeding the relevancy standard for other discovery. *See Schlagenhauf*, 379 U.S. at 118 (quoting *Guilford Nat'l Bank of Greensboro v. Southern Ry. Co.*, 297 F.2d 921, 924 (4th Cir. 1962)); *Simms*, ¶ 30. "Good cause" under Rule 35 means "good cause for the specific examination requested by a defendant." *Simms*, ¶ 33. Among other elements to be weighed in a court's case-by-case good cause determination, the "scope of an examination must be balanced with the plaintiff's inalienable rights." *Id.*

Here, the District Court appropriately found the scope of the requested examinations was too broad. Solely to resolve the threshold issue of standing, Defendants demanded two-hour psychiatric examinations which "may also include, but [are] not limited to," Plaintiffs' "psychological and behavioral history, alcohol and drug use, school performance, and exposure to trauma." Doc. 224 at 7. *Id.* The District Court's determination regarding the lack of good cause for Defendants' requested examinations reflects the necessary outcome based on application of prior Rule 35 decisions from this Court, and it certainly does not amount to an abuse of discretion.

First, in *Malloy v. Mont. Eighteenth Jud. Dist. Ct.*, No. OP 11-0038 (Mont. Mar. 31, 2011), this Court rejected efforts by the defendant to conduct invasive MRI-testing in hopes to "'possibly show' other disorders that would minimize the likelihood that [plaintiff's injuries] were caused by the accident" at issue. *Malloy*, at *6. The Court recognized that, "Rule 35(a) does not contemplate [Rule 35 examinations] as vehicles for conducting unnecessary fishing expeditions in hopes of finding any other possible cause for an alleged injury." *Id.* at *5. Emphasizing the searching nature of the MRI and its "dubious projections" for success, the Court held good cause was not present and reversed the examination that had been ordered. *Id.* at *7.

So, too, here. Defendants admitted that proposed questions were intended as a search for other grounds that might be argued as the source of Plaintiffs' emotional harm. Doc. 225 at 7. The District Court correctly rejected this attempted "probing" as a "fishing expedition" unauthorized by Montana law.

Second, the District Court's decision properly followed this Court's prior recognition that "[a] psychiatric examination is particularly invasive of an individual's right to privacy." *Mapes v. Eighth Jud. Dist. Ct.*, 250 Mont. 524, 532, 822 P.2d 91, 96 (1991). Fishing expeditions advanced pursuant to Rule 35 are not allowed. And fishing expeditions into *psychological* matters pursuant to Rule 35 and *Mapes* are even more offensive and cannot be condoned in Montana under any circumstances.

This Court in *Mapes* further held that Rule 35 does not entitle a defendant to "unnecessarily invade plaintiff's privacy by exploring totally unrelated or irrelevant matters." *Mapes*, 250 Mont. at 530, 822 P.2d at 95. Here, the District Court properly prevented Defendants from probing into such "unrelated or irrelevant matters" as the youth Plaintiffs' alcohol or drug use. Doc. 225 at 7–8.

Third, the District Court relied upon the "ample alternatives" available for Defendants to defend against the emotional harm asserted by Plaintiffs, including depositions of the eight youth. *Id.* The District Court's consideration of "other means" appropriately followed Montana's Rule 35 law. *See Simms*, ¶¶ 30, 33.

Notably, Defendants also retained a mental health expert, who filed an expert report but was *not* called to testify at trial. Further, Defendants could have cross-examined Plaintiffs about their mental health injuries, but didn't. *See* Doc. 242, Exh. Q.

In sum, the District Court's order denying Defendants' requested Rule 35 examinations was not an abuse of discretion.

CONCLUSION

First, our adversarial system of justice is predicated on resolution of disputed facts through trial, whether the trier of fact is jury or judge. Here, with disputed issues of material fact precluding summary ruling, the District Court appropriately allowed this case to proceed to trial.

Second, the District Court's denial of Defendants' demand for Rule 35 examinations was solidly based on this Court's controlling precedent. The District Court thoughtfully balanced the parties' interests, to conclude that Plaintiffs' privacy rights vastly outweighed Defendants' purported need for invasive, intrusive, and irrelevant psychological tests.

RESPECTFULLY SUBMITTED this 21st day March 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionally spaced Times New Roman typeface of 14-point size; is double-spaced; and contains not more than 5,000 words, excluding certificate of service and certificate of compliance.

RESPECTFULLY SUBMITTED this 21st day March 2024.

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