

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 216-6-20 Wncv

LATONIA CONGRESS,
Plaintiff,

v.

CENTURION OF VERMONT, LLC; and
STEVEN FISHER, M.D., In His Official
and Individual Capacity,
Defendants¹

RULING ON PLAINTIFFS' REQUEST FOR ATTORNEY'S FEES (Motion #21)

In this civil action, Plaintiff Latonia Congress, who is an inmate in the custody of the Vermont Commissioner of Corrections, alleges that the Defendants breached the applicable standard of care by failing to have her hearing tested by a hearing specialist and by failing to provide her with functioning hearing aids. In the course of discovery, Plaintiff's counsel started to take the deposition of Defendant Steven Fisher, who was the Medical Director for Defendant Centurion of Vermont, LLC, a private corporation which provided care to Vermont inmates pursuant to a contract with the Department of Corrections. During the deposition, Dr. Fisher testified that he followed one of Centurion's guidelines in deciding not to refer the Plaintiff to an outside audiologist when she complained about her inability to hear.

Plaintiff's counsel then asked Dr. Fisher a series of questions designed to determine whether he had looked at anything other than Centurion's guidelines in determining what the applicable standard of care was for referring a patient such as the Plaintiff to a hearing specialist (Transcript of the Deposition of Dr. Steven Fisher, beginning at page 169). For example, counsel asked Dr. Fisher "Have you made any effort to determine whether this particular [Centurion] guideline with respect to hearing testing is consistent with the standard of care that is generally prevailing?" (Id. at p. 174, line 12). Dr. Fisher's answers seemed to indicate that he

¹ Plaintiff initially included as defendants several other parties associated with the Vermont Department of Corrections, but they have all been dismissed leaving Centurion of Vermont, LLC and Steven Fisher, M.D. as the only remaining Defendants.

had not done anything to confirm whether Centurion's guideline met the prevailing standard of care, but, when asked to answer the question "yes" or "no," Dr. Fisher refused, claiming that he could not do so (*Id.*). Therefore, the deposition was suspended so that Plaintiff could seek an order from the Court as to whether Dr. Fisher should be required to answer the question "yes" or "no." Centurion and Dr. Fisher opposed the motion.

On November 30, 2021, this Court granted Plaintiff's motion to compel and ordered Dr. Fisher to answer "yes" or "no" to the question, "Have you made any effort to determine whether this particular [Centurion] guideline with respect to hearing testing is consistent with the standard of care that is generally prevailing?" (Ruling on Plaintiff's Motion to Compel, 11/30/21, at 2). The Court held that Dr. Fisher's answers to the question asked had been evasive, that the question whether Dr. Fisher complied with the applicable standard of care was of core relevance to the claim asserted by the Plaintiff, and that the question clearly called for a "yes" or "no" answer (*Id.*).

Presently before the Court is Plaintiff's request for an award of \$4,391.50 in attorney's fees for having to file her motion. Plaintiff contends that she is entitled to such an award because the fees requested are reasonable in amount, they were necessitated by Dr. Fisher's repeated refusal to answer "yes" or "no" to a "simple, relevant and important question," his refusal was unjustified, and he was specifically warned that Plaintiff would seek an order from the Court and an award of attorney's fees if he persisted in his refusal to answer the question directly (Request for Attorney's Fees, at 3-5). Plaintiff further contends that the Court should impose its award not only against Dr. Fisher but also against his attorney because "they were both involved in the decision not to answer the question" (Oral Argument held on 2/17/22).

Defendants oppose the motion. They contend that Plaintiff's request for attorney's fees should be denied because it was filed out of time, because awarding fees would be unjust, because the request seeks fees not contemplated by the applicable rules, because the hourly rates used are excessive, and because no time sheets were submitted showing that the amount of time spent was necessary (Defendants' Opposition to Plaintiff's Motion for Costs and Request for Oral Argument, 2-5).

"If the motion [to compel] is granted, the judge shall, after opportunity for hearing, require the party or deponent, whose conduct necessitated the motion ... to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the judge finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." V.R.C.P. 37(a)(4). Plaintiff has ten (10) business days to file her request for an award of fees, together with an explanation of why the request should be

granted. Defendants will then have ten (10) business days to respond. The clerk will then schedule a thirty-minute remote hearing on the request.

The Court agrees with the Plaintiff that Dr. Fisher's refusal to answer "yes" or "no" to the question posed to him at his deposition was "unjustified" within the meaning of Rule 37(a)(4); indeed, the Defendants in their opposition memorandum do not proffer any justification for the refusal. They argue instead that Plaintiff's request should be denied because it was filed out of time and because awarding fees would be unjust. It would be unjust, according to the Defendants, because Dr. Fisher at his deposition provided Plaintiff's counsel with "a more thorough explanation of this thought process" than a "yes" or "no" answer would have done, and he "provided additional information to Plaintiff's counsel about how [he] viewed the case, his role, and the guidelines" (Defendants' Opposition, 3-4).

Plaintiff's request for attorney's fees was not filed out of time. In its November 30th ruling granting Plaintiff's motion to compel, the Court set a deadline of "ten (10) business days" for Plaintiff to file her fee request. Her request was filed on December 13th, which was well within the ten-business-day deadline. Moreover, Defendants' contention that awarding fees would be unjust is unconvincing. The fact that Dr. Fisher answered questions about his thought process and about how he viewed the case, his role, and the guidelines, is no excuse for his refusal to provide a direct answer to a question going to the core of Plaintiff's malpractice claim against him. Therefore, Plaintiff is entitled to an award of "the reasonable expenses incurred in obtaining the order, including attorney's fees...." V.R.C.P. 37(a)(4). The question is what is "reasonable."

The Court agrees with the Defendants that the 30 minutes of time that Plaintiff's counsel spent at the deposition trying to get Dr. Fisher to answer their question is not covered by Rule 37(a)(4). By its terms the Rule limits recovery to expenses incurred in obtaining this Court's order of November 30th compelling Dr. Fisher to answer the question. Therefore, that time will not be allowed. The Court also agrees with the Defendants that the \$420.00 of fees requested by Attorney Sherman are not recoverable. Attorney Sherman represents the Vermont Human Rights Commission, and, while the Commission has an interest in this matter, and has brought its own suit against the Defendants, which suit has been consolidated with this case, the November 30th order was obtained by Plaintiff Latonia Congress, not by the Commission. Therefore, only she is entitled to an award of attorney's fees for obtaining that order.

The Court also agrees with the Defendants that Attorney Valente's proposed hourly rate of \$325 is excessive. Although Attorney Valente may have special knowledge and experience in the narrow field of prisoners' rights to medical care, he has not submitted an affidavit justifying such an hourly rate in connection with this motion. Moreover, the work needed to obtain this Court's order compelling

discovery did not require any particular expertise. It was the kind of task that attorneys in Vermont typically do for much closer to \$200 an hour. Therefore, the Court will use \$200 an hour in computing a reasonable attorney's fee award.

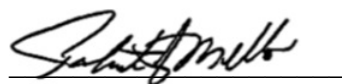
However, the Court does not agree with the Defendants' contention that Plaintiff's request for fees should be denied for failure to provide copies of time sheets proving the amount of time actually by counsel spent working on the motion to compel. While that might have been helpful, it was not necessary. The Court accepts the representations of Attorneys Valente and Hozid that they spent approximately 15 hours pursuing Ms. Congress' motion to compel. That amount of time was clearly needed in order to present the level of detail that was included in Plaintiff's motion and supporting memorandum, and to then argue the motion to the Court. Therefore, the Court will order Dr. Fisher to reimburse the Plaintiff \$3,000 in attorney's fees (15 hours times \$200 an hour).

In a "Supplemental Opposition" filed on February 17, 2022, Defendants argue that Plaintiff's motion for fees should be denied for the additional reason that, when Dr. Fisher's deposition was resumed on January 20th, Plaintiff's counsel failed to ask Dr. Fisher the question that this Court had compelled him to answer in its November 30th order. The Court has reviewed the transcript of the January 20th deposition session, however, and the Court is satisfied that Plaintiff's counsel did ask Dr. Fisher substantially the same question as the Court had ordered him to answer.

Lastly, the Court rejects Plaintiff's argument that the Court should impose its award not only against Dr. Fisher but also against his attorney. From the Court's reading of the deposition, it does not appear that defense counsel instructed Dr. Fisher not to answer a question that he was otherwise prepared to answer. It appears instead that Dr. Fisher made his own decision not to answer the question, and that his attorney then attempted to support him in his decision.

For the foregoing reasons, Dr. Fisher is ordered to reimburse the Plaintiff \$3,000 in attorney's fees.

SO ORDERED this 20th day of February, 2022.



Robert A. Mello
Superior Judge