

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 216-6-20 Wncv

LATONIA CONGRESS,
Plaintiff,

v.

STATE OF VERMONT,
AGENCY OF HUMAN SERVICES and
DEPARTMENT OF CORRECTIONS;
BENJAMIN WATTS, In His Official and
Individual Capacity;
HEIDI FOX, In Her Official and Individual
Capacity;
CENTURION OF VERMONT, LLC; and
STEVEN FISHER, M.D., In His Official
and Individual Capacity,
Defendants

RULING ON PLAINTIFF'S MOTIONS TO COMPEL AND TO EXTEND
DEADLINE (Motions #18 and 20)

I. Plaintiff's Motion to Compel

In this civil action, Plaintiff Latonia Congress, who is an inmate in the custody of the Commissioner of Corrections, seeks an award of damages for the Defendants' alleged failure to provide her with the medical care to which she claims to be entitled. More specifically, Plaintiff contends 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 started to take the deposition of Steven Fisher, M.D., who was the Medical Director for 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 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." Defendants oppose the motion; they suggest that Dr. Fisher gave the best answer he could, given the subtleties and complexities of the question.

"If a deponent fails to answer a question propounded or submitted under Rules 30 or 31 ... the discovering party may move for an order compelling an answer...." V.R.C.P. 37(a)(2). The Rule goes on to provide that "an evasive or incomplete answer or response is to be treated as a failure to answer or respond." Id. 37(a)(3).

The Court agrees with the Plaintiff that Dr. Fisher's answers to the question asked were evasive. The question whether Dr. Fisher complied with the applicable standard of care is of core relevance to the claim asserted by the Plaintiff. Dr. Fisher clearly testified that he relied on Centurion's guideline and that he believed or assumed that the guideline was consistent with the applicable standard of care. Moreover, his answers seemed to suggest that he had not done anything to confirm whether Centurion's guideline met the prevailing standard or care. However, when asked that question directly, he refused to answer "yes" or "no," even though the question clearly called for a "yes" or "no" answer. There were no subtleties or complexities justifying Dr. Fisher's refusal to answer the question "yes" or "no."

Therefore, the Plaintiff's motion to compel is GRANTED. The Court orders 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?"

Plaintiff has also requested an award of attorney's fees for having to file her motion. "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.

II. Plaintiff’s Motion to Extend Deadline

On August 19, 2021, Plaintiff filed a motion with the Court seeing an order to extend certain deadlines (i.e., the deadline for Plaintiff to complete depositions, including the depositions of Defendants’ experts, the deadline completing mediation, the deadline for pretrial motions, and the deadline for trial readiness) by 60 days following the Court’s ruling on the motion to compel referred to above. Defendants Centurion and Fisher oppose the motion on the grounds that most of the deadlines in question had already expired before the motion was filed (under the then-existing scheduling order, the deadline for completing non-expert depositions was July 30, 2021, the deadline for completing the depositions of defense expert was August 13, 2021, the deadline for completing mediation was August 6, 2021, the deadline for pretrial motions was August 30, 2021, and the deadline for trial readiness was October 30, 2021).¹

The Court, in its discretion, may extend deadlines “for good cause ... if a request is made before the original time or its extension expires.” V.R.C.P. 6(b)(1)(A). Here, Plaintiff’s motion to extend deadlines was filed before the deadlines for pretrial motions and trial readiness had expired. Moreover, although the motion was filed days after the deadlines for deposing defense experts and completing mediation had expired, Plaintiff’s counsel had asked defense counsel to agree to such an extension without the need for a motion prior to the August 13th deadline. Therefore, the Court will treat those requests as also having been made before the deadline expired.

Good cause certainly exists to extend the deadlines for completing defense expert depositions, for completing mediation, for filing pretrial motions and for trial readiness by 60 days from today’s decision on Plaintiff’s motion to compel. Dr. Fisher’s refusal to answer “yes” or “no” questions at his deposition necessitated the filing of the motion to compel, and his and Centurion’s opposition to the motion to compel contributed to the delay in getting that motion resolved. Plaintiff should not be prejudiced by that delay. Moreover, neither Centurion nor Dr. Fisher would be prejudiced by granting the requested extensions. Therefore, the Court hereby extends the deadlines for completing the depositions of defense experts, completing mediation, filing dispositive motions, and trial readiness to January 31, 2022.

¹ Centurion and Dr. Fisher do not object to extending the deadline for filing dispositive motions.

Plaintiff's motion to extend the deadline for completing non-expert depositions, however, is denied. The motion to extend was filed after that deadline had already expired, so that deadline can only be extended if the delay in filing the motion was "because of excusable neglect." V.R.C.P. 6(b)(1)(B). No such excusable neglect has been shown. Moreover, Plaintiff has not offered any explanation as to who still needs to be deposed or why he or she was not deposed earlier.

II. Conclusion and Order

For the foregoing reasons, Plaintiff's motion to compel is GRANTED. Dr. Fisher is hereby ordered 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?"

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.

Plaintiff's motion to extend deadlines is GRANTED in part and DENIED in part. More specifically, the deadlines for completing the depositions of defense experts, completing mediation, filing dispositive motions, and trial readiness are hereby extended to January 31, 2022. However, the deadline for completing non-expert depositions is not extended and has expired.

SO ORDERED this 30th day of November, 2021.



Robert A. Mello
Superior Judge