

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NICHOLAS HARRISON and	.	Civil Action No. 1:18cv641
OUTSERVE-SLDN, INC.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	May 16, 2019
MARK T. ESPER, Acting	.	9:14 a.m.
Secretary of Defense, et al.,	.	
	.	
Defendants.	.	

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RICHARD ROE; VICTOR VOE; and	.	Civil Action No. 1:18cv1565
OUTSERVE-SLDN, INC.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	
	.	
MARK T. ESPER, Acting	.	
Secretary of Defense, et al.,	.	
	.	
Defendants.	.	

TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

(Pages 1 - 13)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action 18-1565, Richard Roe, et al.
3 v. United States Department of Defense, et al.; and Civil
4 Action 18-641, Nick Harrison v. James Mattis, et al. Would
5 counsel please note their appearances for the record.

6 MS. KIMBALL: Good morning, Your Honor. I'm
7 Assistant United States Attorney Kimere Kimball here today on
8 behalf of the government. With me is Robert Norway from the
9 Federal Programs Branch of the Department of Justice, who will
10 be handling the final pretrial conference.

11 THE COURT: Mr. Norway, you have such an interesting
12 name. I always can remember it. It's very nice to see you in
13 court again.

14 MR. NORWAY: Thank you, Your Honor.

15 THE COURT: And for the plaintiffs?

16 MR. SOMMER: Good morning. Andrew Sommer on behalf
17 of the plaintiffs, and with me today is Scott Schoettes, Julie
18 Bauer, and John Harding.

19 THE COURT: Good morning.

20 MR. SCHOETTES: Good morning.

21 MS. BAUER: Good morning.

22 MR. HARDING: Good morning.

23 THE COURT: All right. So this is the final
24 pretrial, although I know there's still discovery. I haven't
25 gotten you yet my ruling on the deliberative privilege, which

1 you'll hopefully get by the end of next week, but in the
2 meantime, where -- have you-all talked about -- is discovery
3 finished other than that one issue?

4 MR. SOMMER: Your Honor, there is one other issue
5 that we're currently conferring with the government about, and
6 that is, one of their witnesses that was disclosed is actually
7 a colonel in the Army, and the discussion centers on whether or
8 not they need to search his files for discoverable information
9 that may be inconsistent with the opinions he intends to offer
10 at trial.

11 We're currently working that out, and I hope that
12 we're not going to have to involve the Court with that
13 particular dispute.

14 THE COURT: But that means then that you have not
15 taken that person's deposition.

16 MR. SOMMER: He has had his deposition.

17 THE COURT: Oh, he has.

18 MR. SOMMER: But we found that they did not search
19 his files in response to document requests.

20 THE COURT: All right. So other than that and other
21 than the issue that's still pending before the Court, are there
22 any other open discovery issues in either the Roe or the
23 Harrison cases?

24 MR. SOMMER: So besides the objections that are
25 before Your Honor in the Harrison case, there is a motion to

1 compel on deliberative process privilege documents currently
2 held in abeyance in front of Judge Davis. He wanted to wait
3 for your ruling.

4 THE COURT: All right.

5 MR. SOMMER: So that that is still pending and will
6 likely have to work its way through the process as well.

7 THE COURT: So there's now deliberative process
8 documents now, the second production of them?

9 MR. SOMMER: I believe it is a different set of
10 documents that's being withheld, and I don't know the degree of
11 overlap at the moment. Mr. Harding may be able to shed some
12 light on that.

13 THE COURT: You need to be at the lectern. Yes,
14 Mr. Harding.

15 MR. HARDING: Yes, Your Honor. There are 89
16 additional documents that are at issue that are separate from
17 the ones before, before Your Honor that are before Judge Davis.

18 THE COURT: Now, you know, in some respects, we're
19 treating these two cases somewhat similarly, but they're still
20 different cases, I mean, Roe and Harrison. Are these
21 documents, do they touch on both cases?

22 MR. HARDING: They do, Your Honor, and they were
23 produced after the motion to compel was filed in the Harrison
24 matter, and so this was kind of an add-on to that.

25 THE COURT: All right. But this is the -- these

1 issues are the only remaining discovery issues that you've got?

2 MR. SOMMER: That -- that's right, Your Honor.

3 THE COURT: All right. Well, I think realistically,
4 it might take another four or five weeks to get them all
5 resolved if you still have some before Judge Davis because he'd
6 have to rule, and then depending upon what he does, at least
7 one side is going to be unhappy, so that means there's going to
8 be an appeal to us. So I think that's a realistic approach.

9 So we're looking at probably towards the end of June
10 before the discovery is 100 percent finished. At that point,
11 is there an anticipation of filing dispositive motions?

12 MR. SOMMER: For plaintiffs in the Roe case, Your
13 Honor, yes. Those plaintiffs anticipate moving for summary
14 judgment on the APA-related claims, at least some of them. In
15 the Harrison case, at this time, Mr. Harrison does not
16 anticipate filing a motion for summary judgment.

17 THE COURT: All right. And how about from the
18 government's standpoint?

19 MR. NORWAY: Your Honor, the government intends to
20 file a dispositive motion in both cases.

21 THE COURT: All right. So we're probably looking at
22 sometime in early July when that might be appropriate or
23 mid-July. I think the best thing in this case is to go ahead
24 and we'll set a trial date so at least we have it on the
25 calendar.

1 I think both cases should be triable together,
2 although probably summary judgment is going to resolve the
3 issues. I don't know, but it's possible it might not. Some of
4 these are matters of law, I think, and I don't know how much
5 additional evidence is necessary, but were the case -- the
6 cases to not be resolved on summary judgment, we're probably
7 looking at September as a reasonable time for trial.

8 MR. SOMMER: Yes, Your Honor. And speaking to the
9 issue of a consolidated hearing, we discussed that with the
10 government prior to today, and I think we're in agreement that
11 should there be a trial, the evidence can be taken in one
12 proceeding.

13 THE COURT: That's fine. And I would think if the
14 case does go to trial, what does the plaintiff anticipate is
15 taking -- how long to put your case on in direct?

16 MR. SOMMER: We were thinking on the order of 15 to
17 17 hours given the number of experts and fact witnesses in the
18 case, and I think the government had similar thoughts as to
19 their case.

20 THE COURT: So probably a week? A week?

21 MS. KIMBALL: (Nodding head.)

22 THE COURT: A week, all right. How is the week of,
23 the week of September -- oh, hold on a second.

24 September 30?

25 MR. SOMMER: So we discussed that as a possible date.

1 Unfortunately, both of our medical experts are attending --

2 THE COURT: A conference?

3 MR. SOMMER: -- the big, yeah, infectious disease
4 conference.

5 In fact, Dr. Hardy is the chair of that particular
6 conference, so it's, it's not an issue that he can possibly
7 move.

8 THE COURT: All right, how about the week of the
9 16th, September 16?

10 MR. SOMMER: It is workable for us with one
11 exception. Our key medical expert, Dr. Hendrix, is unavailable
12 on the 16th and 17th of that week, but if we can navigate trial
13 around that --

14 THE COURT: We can usually --

15 MR. SOMMER: -- that's not a problem.

16 THE COURT: Yeah. This is set for a bench trial?

17 MR. SOMMER: Yes, Your Honor.

18 THE COURT: We have lots of flexibility in that
19 respect. So even if you rested at the close of business on the
20 17th and we started the government's case, we could have your
21 witness come in. But he could testify on the 8th, is that
22 right?

23 MR. SOMMER: He's going to be coming in town the
24 night of the 17th. I believe so. I need to figure out exactly
25 what his travel plans are.

1 THE COURT: Now, when you say he has travel plans, is
2 this for business or pleasure?

3 MR. SOMMER: This is a conference in Chicago that he
4 is chairing, so this is the other medical expert, Dr. Hendrix,
5 and he's going to be in Chicago on the 16th and 17th. He's
6 giving a presentation at one of those conferences.

7 THE COURT: Would he have enough time to do a video?
8 I mean, I've taken testimony that way. We have the setup in
9 this courtroom, and if he's in Chicago, he can go to the
10 federal courthouse in Chicago. Does he need to be at the
11 conference the full time both days?

12 MR. SOMMER: I don't know the answer to that, Your
13 Honor. I believe he should have some degree of flexibility.
14 As to whether he can testify from the courthouse in Chicago,
15 I'm not exactly certain. I'd need to confer with Dr. Hendrix.

16 THE COURT: Right. There's a one-hour time
17 difference, too, that might make it easier, or more difficult.

18 I don't think that's a problem, but I think the 16th
19 is -- how's that for the government and your witnesses?

20 MR. NORWAY: Your Honor, of the witnesses that we
21 intend to call, there is only one witness who is not available
22 the week of the 16th. If the trial continues into the week of
23 the 23rd, he's available then.

24 THE COURT: Well --

25 MR. NORWAY: Or we can also take a trial deposition.

1 THE COURT: Well, I'd rather -- rather than a trial
2 deposition, because I can't control it, I can control live
3 testimony, is there any reason why that witness could not get
4 to a federal courthouse so that we could do it by live video?

5 MR. NORWAY: He might not be in the United States at
6 that time. He might be in Belize.

7 THE COURT: Well, I don't want to artificially
8 continue the trial. I mean, if we finish it -- so he's not
9 available at all that week?

10 MR. NORWAY: Correct. His unavailability begins on
11 the 13th and ends on the 20th.

12 THE COURT: Well, actually we don't have a problem.
13 It's a bench trial. I keep thinking with bench trials, it's
14 not as much a difficulty.

15 And you said the week of the 30th was not available?

16 MR. SOMMER: That's right, Your Honor. That's,
17 that's difficult on both the plaintiffs' medical experts.

18 THE COURT: Well, how about Tuesday, September 10?
19 I'm sorry, we can start Monday, can't we? That's not Labor
20 Day. Monday, September 9?

21 MR. SOMMER: Your Honor, that works for plaintiffs.

22 MR. NORWAY: And also for the government, Your Honor.

23 THE COURT: That's excellent. We'll start at 9:30.

24 All right. So I think at this point, have you filed
25 what witness and exhibit lists you-all have at this point? I

1 know there are still exhibits that might be coming in based on
2 some rulings that are still out there.

3 MR. SOMMER: Your Honor, earlier this week, we moved
4 for an extension of time on that, which Your Honor granted to
5 the 30th of May.

6 THE COURT: Okay.

7 MR. SOMMER: So those are in the works and will be
8 filed with the Court on or before that date.

9 THE COURT: That's fine. And then, obviously, your
10 time to object to those filings should come, you know,
11 appropriately thereafter. All right?

12 MR. SOMMER: Yes.

13 THE COURT: Anything further we need to address with
14 this case -- or these cases?

15 MR. SOMMER: Your Honor, I just had a question about
16 trial logistics and deposition designations and how Your Honor
17 would like to have deposition testimony handled during the
18 trial given that this is a bench trial.

19 THE COURT: Well, how many depositions are we
20 working -- you talking about?

21 MR. SOMMER: Well, there are, there are many
22 depositions in this case. I think there are over 20. However,
23 I'm thinking that there may be on the order of eight or nine
24 that we would want testimony in the record for.

25 THE COURT: Were these videotaped depositions?

1 MR. SOMMER: Some. And I'd, I'd say most of them
2 were. I think there are a handful that were not.

3 THE COURT: Well, what we want you to do is to work
4 with the other side and, to the extent possible, come to an
5 agreement. I only want to get involved if there's a real
6 dispute as to particular parts of the testimony. And I want
7 the testimony, you know, made as succinct as possible, and
8 that -- so I only get involved if there's a dispute.

9 MR. SOMMER: And, Your Honor, my question is more
10 directed as to how would Your Honor like it presented? Would
11 you like the time during trial spent putting on the testimony
12 live in the courtroom?

13 THE COURT: Yes. It gives us that context. The only
14 thing, so you understand it, is I don't require my court
15 reporter to be taking it down as it's being played because
16 you've got the transcript. So we introduce the transcript as
17 the, as the record that is played for the Court. All right?

18 MR. SOMMER: Okay. Yep. Thank you, Your Honor.

19 THE COURT: And then proposed findings and
20 conclusions should be filed at least one week before the trial
21 starts so we have a clear picture of what's going on.

22 MR. SOMMER: And then is it Your Honor's practice to
23 have a post-hearing briefing as well?

24 THE COURT: It depends.

25 MR. SOMMER: Okay.

1 THE COURT: If I'm satisfied that I've heard enough,
2 you get to do closing arguments, and then we'll just do the
3 opinion.

4 MR. SOMMER: All right.

5 THE COURT: All right?

6 MR. SOMMER: Thank you very much, Your Honor.

7 THE COURT: Was there anything from the government,
8 Mr. Norway?

9 MR. NORWAY: No, Your Honor.

10 THE COURT: All right, very good. Then we'll try to
11 get an answer to you on the matter that's pending before us, as
12 I said, I'm hopeful by the end of next week.

13 All right, you're all free to go. Thank you.

14 (Which were all the proceedings
15 had at this time.)

16

17 CERTIFICATE OF THE REPORTER

18 I certify that the foregoing is a correct transcript of
19 the record of proceedings in the above-entitled matter.

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21

22

/s/

Anneliese J. Thomson

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