IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, *et al.,* *Plaintiffs*, v. DALE FOLWELL, in his official capacity as State Treasurer of North Carolina, *et al.,* *Defendants*.	Case No. 1:19-cv-00272-LCB-LPA

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. PETER ROBIE

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Now come Plaintiffs, by and through their counsel, and respectfully submit this Memorandum of Law in support of their Motion to Exclude the expert testimony of Dr. Peter Robie.

I. NATURE OF THE CASE AND FACTUAL BACKGROUND

Plaintiffs are current or former participants in the North Carolina State Health Plan for Teachers and State Employees ("State Health Plan"). As part of compensation for employment, the State of North Carolina ("State") provides health coverage to employees and their dependents through the State Health Plan. Some employees and their dependents, however, receive less compensation than others: those denied coverage for the gender-affirming care that transgender people require. The State Health Plan contains sweeping exclusions of such care, while covering the same kinds of treatments for cisgender employees who require them for other reasons. Defendants thus deny equal treatment to employees who are transgender or have transgender dependents, and harm transgender family members who depend on employees for health care coverage.

II. PROCEDURAL BACKGROUND

Pursuant to the Parties' Rule 26(f) Joint Report, adopted by this Court on August 13, 2020, Plaintiffs identified and disclosed expert reports for Dr. George R. Brown and Dr. Loren S. Schechter. On May 1, 2021, Defendants Dale Folwell, Dee Jones, and the State Health Plan (collectively, "Health Plan Defendants") identified and disclosed reports from the following experts: Dr. Paul R. McHugh, Dr. Paul W. Hruz, Dr. Stephen B. Levine, and Dr. Patrick W. Lappert. In addition, the Health Plan Defendants identified Defendant

Folwell, Defendant Jones, and Dr. Peter W. Robie as experts, but, as permitted by Rule 26(a)(2), they did not disclose any reports.[1] Subsequently, Plaintiffs identified and disclosed expert rebuttal reports for Dr. Randi Ettner, Dr. Dan Karasic, and Dr. Johanna Olson-Kennedy.

The Health Plan Defendants identified Dr. Robie to provide expert testimony on the following issues: (1) "the Board[] [of Trustees'] consideration of requests that the Plan eliminate the current coverage exclusion for gender transition surgery and related hormone treatment"; (2) "the medical knowledge he has shared with other Board members"; and (3) Dr. Robie's opinion that, "in order to provide diagnostic and medical treatment that meets a professional standard of care, primary care physicians must know the chromosomal sex of patients."[2] Disclosure of Expert Witnesses Who Do Not Provide a Written Report Pursuant to Fed. R. Civ. P. 26(a)(2) by Defs. Dale Folwell, Dee Jones, and the North Carolina State Health Plan for Teachers and State Employees 6, May 1, 2021.

Plaintiffs now move to exclude Dr. Robie's opinions and testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and its progeny, because Dr. Robie is not qualified to opine about gender dysphoria or its treatment, and his opinions and

[1] Defendant North Carolina Department of Public Safety also identified and disclosed an expert report, but those disclosures are not subject to Plaintiffs' Motion.

[2] A true and accurate copy of the May 1, 2021 Disclosure of Expert Witnesses Who Do Not Provide a Written Report Pursuant to Fed. R. Civ. P. 26(A)(2) by Defendants Dale Folwell, Dee Jones, and the North Carolina State Health Plan for Teachers and State Employees ("State Health Plan Disclosures") is attached as Exhibit A to the Declaration of Deepika Ravi.

testimony are neither relevant nor reliable. His opinions and testimony are likewise inadmissible because any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, undue delay, and needless presentation of cumulative evidence. Fed. R. Evid. 403.

III. STATEMENT OF THE QUESTION PRESENTED

Whether the testimony of Defendants' expert Dr. Peter Robie should be excluded because it is irrelevant, unreliable, and he is unqualified to offer it in accordance with *Daubert* and the applicable Federal Rules of Evidence.

IV. SUMMARY OF THE ARGUMENT

This Court should disqualify Dr. Robie as an expert for a number of reasons.

First, Dr. Robie is not qualified to provide the opinions identified in his disclosure and deposition. Dr. Robie, who practices internal medicine, admits he is not an expert in the diagnosis or treatment of gender dysphoria and has no other relevant experience with diagnosis or treatment of gender dysphoria. Further, although Dr. Robie testified during his deposition regarding the alleged cost of providing gender-confirming care, Dr. Robie admits he is not an expert in the cost of treatment for gender dysphoria. Dr. Robie testified regarding his friendship with Defendant Folwell, yet Dr. Robie's personal relationship with Defendant Folwell does not make him an expert on any matter at issue in this lawsuit. Robie Dep. 18:18–19:7 (testifying that Dr. Robie and Defendant Folwell have "been friends since the 1980s," since Defendant Folwell became Dr. Robie's patient).

Second, his opinions are not relevant to the issues to be addressed by this Court. Although Dr. Robie has been designated to testify to the medical knowledge he has shared with other members of the Board of Trustees (the "Board") for the State Health Plan, Dr. Robie testified that the medical knowledge he has shared with the Board pertains to issues wholly unrelated to those before the Court—for example, coverage of continuous glucose monitors for diabetic patients and biological agents for cancer treatment.

Third, even if he were deemed a qualified expert with relevant opinions—and Dr. Robie is not—his opinions are not based on scientific, technical, or other specialized knowledge. Instead, they are based on his own *ipse dixit* and amount to no more than Dr. Robie's pure speculation. Dr. Robie admits that he has never taught on the subject of gender dysphoria and has never conducted research or been published on this subject. And, despite his forty-five years as a medical practitioner, Dr. Robie testified that only four of his patients—all adults—have identified as transgender, to his knowledge.

As Dr. Robie is not qualified to render the proffered opinions, they are neither relevant nor reliable pursuant to the standards set forth in *Daubert* and its progeny. When viewed in the context of Federal Rule of Evidence 403, any probative value of the opinions is substantially outweighed by the danger of unfair prejudice, confusion of issues, waste of time, undue delay, and needless presentation of cumulative evidence and this Court should exclude them.

V. ARGUMENT

Dr. Robie's purported expert testimony should be excluded because it does not meet any of the indicia for admissibility under Daubert and the Federal Rules of Evidence.

A. Legal Standard

Federal Rule of Evidence 702 places "a special gatekeeping obligation" on a trial court to ensure that an expert's testimony is "*relevant* to the task at hand" and "rests on a *reliable* foundation." *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (quoting *Nease v. Ford Motor Co.*, 848 F.3d 219, 229–30 (4th Cir. 2017)); *Daubert*, 509 U.S. at 597; *see* Fed. R. Evid. 702, Advisory Comm. Notes (2000 Amendments) (amendment "affirms the trial court's role as gatekeeper," and that "all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful"). The party offering the expert—here, the Health Plan Defendants—carries the burden of establishing the admissibility of an expert's testimony by a preponderance of the evidence. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001).

The trial court's initial step is to determine whether the proposed expert is qualified to render the proffered opinion. In doing so, a trial court considers an expert's professional qualifications and the expert's "full range of experience and training." *Belk, Inc. v. Meyer Corp., U.S.,* 679 F.3d 146, 162 (4th Cir. 2012), *as amended* (May 9, 2012) (quoting *United States v. Pansier*, 576 F.3d 726, 737 (7th Cir. 2009)). If the purported expert lacks the

knowledge, skill, experience, training, or education on the issue for which the opinion is proffered, the trial court must exclude the expert. *See, e.g.*, *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799 (4th Cir. 1989).

Even if the expert is deemed qualified, the trial court must consider the relevancy of the expert's testimony, as it is "a precondition to admissibility." *Sardis*, 10 F.4th at 282 (quoting *Daubert*, 509 U.S. at 592). To be relevant, the testimony must have "a valid scientific connection to the pertinent inquiry." *Sardis*, 10 F.4th at 281 (quoting *Belville v. Ford Motor Co.*, 919 F.3d 224, 232 (4th Cir. 2019)) ("Simply put, if an opinion is not relevant to a fact at issue, *Daubert* requires that it be excluded.").

Finally, if deemed relevant, the trial court will inquire if the opinion is based on a reliable foundation, which focuses on "the principles and methodology" employed by the expert to assess whether it is "based on scientific, technical, or other specialized knowledge and not on belief or speculation." *Sardis*, 10 F.4th at 281 (first quoting *Daubert*, 509 U.S. at 594–95; and then quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999)). When evaluating whether an expert's methodology is reliable, a court considers, among other things:

> (1) whether the expert's theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error inherent in the expert's theory or technique; and (4) whether the expert's methodology is generally accepted in his field of expertise.

Sardis, 10 F.4th at 281 (quotation marks omitted) (quoting *Nease*, 848 F.3d at 229); *see also Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 149–150 (1999); *Daubert*, 509 U.S. at

593–94. While trial courts have "broad latitude" to determine reliability, *Sardis*, 10 F.4th at 281 (quoting *Nease*, 848 F.3d at 299), they still must engage in the gatekeeping process and not simply "delegate the issue to the jury." *Sardis*, 10 F.4th at 281. Even rigorous cross-examination is not a substitute for this Court's gatekeeping role. *See Nease*, 848 F.3d at 231.

In certain situations, when an expert relies upon his experience and training, and not a specific methodology, a modified analysis applies. *See Freeman v. Case Corp.*, 118 F.3d 1011, 1016 n.6 (4th Cir. 1997). When addressing an expert whose methodology is grounded in experience, courts use three factors: "1) how the expert's experience leads to the conclusion reached; 2) why that experience is a sufficient basis for the opinion; and 3) how that experience is reliably applied to the facts of the case." *SAS Inst., Inc. v. World Programming Ltd*., 125 F. Supp. 3d 579, 589 (E.D.N.C. 2015) (citing *SMD Software v. EMove, Inc.*, 945 F. Supp. 2d 628, 644 (E.D.N.C. 2013)); *see also Nat'l Ass'n for Rational Sexual Offense L. v. Stein*, No. 1:17-CV-53, 2021 WL 736375, at *3 (M.D.N.C. Feb. 25, 2021).

Finally, because "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it . . . the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises *more* control over experts than over lay witnesses." *Daubert,* 509 U.S. at 595 (emphasis added) (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)). As such, "the importance of [the] gatekeeping function cannot be

overstated." *Sardis*, 10 F.4th at 283 (alteration in original) (quoting *United States v. Barton*, 909 F.3d 1323, 1331 (11th Cir. 2018)).

B. Dr. Robie Is Not Qualified To Offer an Expert Opinion on Any Issue in This Case.

In order to render expert testimony, the witness must possess the requisite "knowledge, skill, experience, training, or education" that would assist the trier of fact. *Kopf v. Skyrm*, 993 F.2d 374, 377 (4th Cir. 1993) (quoting Fed. R. Evid. 702); *Wright v. United States*, 280 F. Supp. 2d 472, 478 (M.D.N.C. 2003) ("A witness may testify as to his specialized knowledge so long as he is qualified as an expert based on any combination of knowledge, skill, experience, training, or education."). If not qualified, the expert's testimony is unreliable. *Reliastar Life Ins. Co. v. Laschkewitsch*, No. 5:13-CV-210-BO, 2014 WL 1430729, at *1 (E.D.N.C. Apr. 14, 2014).

Dr. Robie lacks the knowledge, skill, experience, training, or education necessary to qualify him as an expert. Dr. Robie practices internal medicine and has no other board certifications, specializations, or areas of practice. Robie Dep. 9:21–10:2; 11:6–11.[3] Dr. Robie acknowledged in his testimony that he is not an expert in the diagnosis or treatment of gender dysphoria, nor has he *ever* treated a patient for gender dysphoria. Robie Dep. 11:12–23. Moreover, Dr. Robie testified that he is not familiar with the Endocrine Society's Clinical Practice Guidelines on Treatment of Gender Dysphoria or Gender Incongruent Persons. Robie Dep. 33:23–34:1. Nor does Dr. Robie have a position on the

[3] A true and accurate copy of transcript excerpts of the deposition of Dr. Robie ("Robie Dep.") is attached as Exhibit B to the Declaration of Deepika Ravi.

validity of the World Professional Association for Transgender Health Standards of Care for Treatment of Gender Identification Disorder ("WPATH Standards of Care"), Robie Dep. 33:3–10, which are authoritative standards of care for treatment of gender dysphoria. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (the WPATH Standards of Care "have been recognized by various courts, including this one, as the authoritative standards of care"). And, when asked if he is "familiar with the DSM 5, the diagnostic and statistical manual of mental disorders definitions," Dr. Robie simply responded, "No." Robie Dep. 33:19–22.

Dr. Robie's lack of experience with diagnosis and treatment of gender dysphoria renders him unfit to offer an expert opinion in this matter. *See, e.g.*, *Mod. Auto. Network, LLC v. E. All. Ins. Co.*, 416 F. Supp. 3d 529, 539 (M.D.N.C. 2019) (affirming the district court's exclusion of an expert because the expert lacked experience relevant to the matters at issue).

Beyond his lack of practical experience, Dr. Robie testified that he has never taught on the subject of gender dysphoria, Robie Dep. 12:21–25; and he has never conducted research on the treatment of gender dysphoria, Robie Dep. 13:4–6, been published in the area of gender dysphoria, Robie Dep. 13:1–3, or peer reviewed any literature on this subject, Robie Dep. 14:8–10. And while Dr. Robie stated he has read medical literature regarding gender dysphoria, he testified that his review was limited to the six months preceding his deposition, and he could not recall the authors of any literature he reviewed. Robie Dep. 13:7–14:7. Dr. Robie's lack of any teaching, research, or peer review

experience with the medical care denied to Plaintiffs in this lawsuit disqualifies him from offering an expert opinion in this matter. *See, e.g.*, *Lebron v. Sec'y of Fla. Dep't of Child. and Fams.*, 772 F.3d 1352, 1369 (11th Cir. 2014) (disqualifying purported expert who did not "propos[e] to testify about matters growing naturally and directly out of research [he had] conducted independent of the litigation" (alteration in original) (quoting Fed. R. Evid. 702, Advisory Comm. Notes (2000 Amendments))).

Defendants also designated Dr. Robie to provide expert testimony about "the Board[] [of Trustees'] consideration of requests that the Plan eliminate the current coverage exclusion for gender transition surgery and related hormone treatment." State Health Plan Disclosures at 6. But this is not a subject on which Dr. Robie can be designated as an "expert" because Dr. Robie's testimony on this subject amounts to nothing more than a recitation of his recollection of an October 2018 Board meeting during which such requests were received. Robie Dep. 19:19–23:10; 81:22–83:14. Dr. Robie's mere presence at the meeting cannot qualify him to provide expert testimony about the meeting. And, when asked what testimony he could provide about the Board's consideration of requests that the State Health Plan eliminate the exclusion, Dr. Robie responded, "[t]he cost of the gender transition surgery and related hormone treatment." Robie Dep. 20:7–11. Yet Dr. Robie admits he is not an expert in the cost of treatment for gender dysphoria, Robie Dep. 11:24–12:1, and as discussed in more detail below, he is not qualified to provide reliable expert testimony on this issue.

C. Dr. Robie's Opinions and Testimony Have No Relevance to This Case.

This case revolves around whether the Health Plan Defendants' exclusion of coverage for gender-confirming healthcare treatment violates Plaintiffs' equal protection rights and discriminates against them on the basis of their sex in violation of Title VII and the Affordable Care Act. Dr. Robie's opinions are not relevant as they will not help the "trier of fact to understand the evidence or to determine a fact in issue." *Nease*, 848 F.3d at 229 (quoting *Daubert*, 509 U.S. at 591). Simply put, Dr. Robie's opinion does not "fit" with the facts at issue. *Bourne ex rel. Bourne v. E.I. DuPont de Nemours & Co.*, 85 F. App'x 964, 966 (4th Cir. 2004); *Viva Healthcare Packaging USA Inc. v. CTL Packaging USA Inc.*, 197 F. Supp. 3d 837, 846 (W.D.N.C. 2016) ("The test for relevance, or fit, considers whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." (quotation marks omitted) (quoting *Daubert*, 509 U.S. at 591)).

For example, although Dr. Robie has been designated to opine about the medical knowledge he has shared with other Board members, Dr. Robie testified that the medical knowledge he has shared pertains to coverage of continuous glucose monitors for diabetic patients and biological agents for cancer treatment, and COVID management, care, and status. Robie Dep. 23:11–25:12; 31:19–32:14. These issues bear no relation to the treatment of gender dysphoria involved in this case, and Dr. Robie could not recall any other medical knowledge he has shared with the Board. Robie Dep. at 24:20–25; 31:19–32:14.

Dr. Robie also provides testimony that, while internally inconsistent, simply does not contravene the relief Plaintiffs seek here. When asked whether surgical care for gender dysphoria can be medically necessary, Dr. Robie characterized it as "elective," but defines "elective" simply to mean "it could be scheduled at an opportune time for the patient and surgeon." Robie Dep. at 68:9–69:13. When asked, "is it correct that some elective care can be medically necessary as determined by the doctor/patient," Dr. Robie acknowledged, "If that's determined, the answer is yes." Robie Dep. 86:5–8. Dr. Robie gave inconsistent testimony on this question: earlier in his deposition, when asked whether if there is ever "a circumstance where a provider and patient together could determine that gender confirming care is medically necessary," Dr. Robie answered, "I don't know." Robie Dep. at 36:22–37:2. Regardless, he does not dispute that treatment for gender dysphoria can be medically necessary. His opinions thus are irrelevant since Plaintiffs simply seek the same opportunity to make individualized showings of medical necessity afforded to all other State Health Plan participants.

D. Dr. Robie's Opinions and Testimony Are Unreliable.

Expert testimony should only be admitted if it is sufficiently reliable. Dr. Robie's opinions are unreliable because they are not grounded in any practical experience, research, or methodology.

While not an exhaustive list, when evaluating whether an expert's methodology is reliable, a trial court will examine:

> (1) whether the expert's theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and

> publication; (3) the known or potential rate of error inherent in the expert's theory or technique; and (4) whether the expert's methodology is generally accepted in his field of expertise.

Sardis, 10 F.4th at 281 (quotation marks omitted) (citing *Nease*, 848 F.3d at 229).

Dr. Robie fails to meet any of these factors. Again, Dr. Robie testified that he has never taught on the subject of gender dysphoria, Robie Dep. 12:21–25, and he has never conducted research on the treatment of gender dysphoria, been published in the area of gender dysphoria, Robie Dep. 13:1–6, or peer reviewed literature on this subject, Robie Dep. 14:8–10. It is not surprising that Dr. Robie wholly fails to meet any of the threshold criteria to qualify him as an expert because Dr. Robie freely admits that he is *not* an expert on diagnosis or treatment of gender dysphoria. Robie Dep. 11:12–23.

Even putting the *Daubert* factors aside, although Dr. Robie claims his experience is sufficient foundation for his opinions, he fails to address how this purported experience leads to his conclusions and how such experience is reliably applied here. *See SAS Inst., Inc.*, 125 F. Supp. 3d at 589; *see also Nat'l Ass'n for Rational Sexual Offense L.*, 2021 WL 736375, at *3.

For example, Dr. Robie has been designated to testify that "in order to provide diagnostic and medical treatment that meets a professional standard of care, primary care physicians must know the chromosomal sex of patients." State Health Plan Disclosures at 6. Defendants point to Dr. Robie's testimony for the principle that "competent medical care requires every diagnosing physician to know and to consider the patient's biological sex." Defs.' Resp. in Opp'n to Pls.' Mot. for Summ. J. 26, ECF No. 197. Yet, Dr. Robie

testified that in his own practice, he does not confirm the chromosomal makeup of his patients, Robie Dep. 29:14–16; 88:1–4, and that he will ask patients about their chromosomal makeup "[o]nly if the nurse says I need to. I can't recall recently where I've been asked to do that." Robie Dep. 87:11–15. Dr. Robie also testified that, despite having been in practice for forty-five years, he formed this opinion only when the present case was filed, around 2019. Robie Dep. 30:3–8. Dr. Robie's recently formed opinion is wholly disconnected from his own experience and does not qualify as an expert opinion. *See, e.g.*, *Nat'l Ass'n for Rational Sexual Offense L.*, 2021 WL 736375, at *3 (excluding expert where offering party failed to establish how expert's "experience leads to his conclusions nor how those experiences have been reliably applied to the facts"); *Lebron*, 772 F.3d at 1369 (disqualifying expert who did not propose "to testify about matters growing naturally and directly out of research [he had] conducted *independent of the litigation*" (alteration in original) (emphasis added) (quoting Fed. R. Evid. 702, Advisory Comm. Notes (2000 Amendments))).

Nor does Dr. Robie have substantial experience on which to draw. By his own testimony, in his forty-five years as a practicing physician, Robie Dep. 78:3–5, to his knowledge, he has treated only *four* patients who identify as transgender, Robie Dep. 88:15–22, and has never treated a patient *for gender dysphoria*, Robie Dep. 11:12–23. Dr. Robie has *never* treated a transgender adolescent or a transgender child. Robie Dep. 88:15–89:5.

Dr. Robie testified to his opinion as to gender-confirming surgery for adolescents, Robie Dep. 78:25–79:14, but then supported his opinion with testimony about his "personal experience" with this issue based on his friendship with the parents of a transgender child who underwent "transgender surgery" but who was not Dr. Robie's patient. Robie Dep. 79:15–23. Such anecdotal experience is insufficient to qualify Dr. Robie, an internal medicine practitioner with no specialization in treatment or diagnosis of transgender individuals, as an expert in this area. *See, e.g.*, *Hartke v. McKelway*, 526 F. Supp. 97, 100–01 (D.D.C. 1981) (family practitioner unqualified to establish the standard of care for surgical procedure, where the practitioner "ha[d] never performed the operation in question," "had no training or experience with that procedure," and a "major reason for her conclusion that there was negligence was that the result was unfavorable"); *Cooper*, 259 F.3d at 200 (affirming the exclusion of an expert who "asserted what amounted to a wholly conclusory finding based upon his subjective beliefs rather than any valid scientific method").

Although Dr. Robie testified during his deposition regarding the alleged cost of providing gender-confirming care, Dr. Robie admits he is not an expert in the cost of treatment for gender dysphoria. Robie Dep. 11:21–12:1. Dr. Robie's own testimony bears out his limited knowledge of the cost of gender-confirming care.

Defendants cite Dr. Robie's testimony regarding his goal to "cut the cost of healthcare for our state workers" to support their claim that limiting health care costs is a "legitimate purpose." Defs.' Resp. in Opp'n to Pls.' Mot. for Summ. J. 33–34, ECF No.

197 (citations omitted). Yet Dr. Robie testified that he was not aware of the total cost that the State Health Plan incurred for covering gender-confirming care in 2017. Robie Dep. 37:9–12. Attempting to offer an opinion about cost without gathering the centrally relevant data on this point—i.e., information about the State Health Plan's actual cost of this care in 2017—cannot be supported.

Nor can Dr. Robie's failure to consider the data actually relevant here be rehabilitated by his Internet research. When Dr. Robie testified that he "looked at the cost" of "transgender surgeries," he acknowledged that his research was limited to an Internet browser search in 2008, a review of only "[f]ive or six" websites around August 2018 and October 2018, and another Internet search the week and the day prior to his deposition. Robie Dep. 38:1-39:15; 50:8–51:12; 56:11–21; 78:6–11, Ex. 4. Dr. Robie testified that he spent approximately 2.5 hours total on this Internet research. Robie Dep. 78:6–11. Dr. Robie could not recall many of the sources he reviewed, Robie Dep. 49:4–17; 50:25–51:2, 55:10–56:4, could not recall any of the dates of the website content, and testified that apart from his limited Internet research, he had never otherwise researched the cost of gender-confirming surgery. Robie Dep. 38:7–43:18; 45:19–46:4, 51:18–53:5. Nor has Dr. Robie ever consulted with other medical providers on how much surgery to treat gender dysphoria might cost. Robie Dep. 43:19–25.

When Dr. Robie testified to the "average cost" of gender-confirming surgery, he could not recall which website presented that figure. Robie Dep. 41:3–11. Dr. Robie further testified that the figure he came up with amalgamated the costs for multiple

different procedures, even though he admitted not every patient may need or want each procedure because care is "very patient specific." Robie Dep. 65:7-23.

As to his own experience, Dr. Robie testified to a single anecdote, which he "guess[ed]" was in approximately 2008, *see* Robie Dep. 48:11–12, with a transgender individual that he helped look into the cost of gender-confirming surgery. Robie Dep. 47:14-48:1. However, even that anecdote is internally inconsistent, referring to the individual as having "no insurance" and then speaking of the cost for the individual "with that insurance." *Id.*

Such limited research and a single anecdotal experience do not qualify Dr. Robie as an expert in this area, especially given his own admission that he is *not* an expert in the cost of treatment for gender dysphoria. *See, e.g.*, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

E. Dr. Robie's Opinions and Testimony Lack Probative Value and Are Thus Inadmissible Under Federal Rule Of Evidence 403.

Finally, the Court should exclude evidence if its introduction will result in unfair prejudice, confusion of the issues, or misleading testimony. Fed. R. Evid. 403. As noted above, Dr. Robie offers no opinions on any factual dispute in this case, and, in any event, the opinions he offers are irrelevant and unreliable. Thus, consideration of Dr. Robie's testimony would waste time and create confusion. Accordingly, Dr. Robie's testimony

also fails to satisfy the requirements of Federal Rule of Evidence 403 and should be excluded.

VI. CONCLUSION

WHEREFORE, based on the foregoing, Plaintiffs respectfully request that this Court grant the instant motion and exclude Dr. Robie's purported expert testimony because it does not meet any of the indicia for admissibility under *Daubert* and the Federal Rules of Evidence. Accordingly, this Court should exclude Dr. Robie's opinions and testimony in full.

Dated: February 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is in compliance with Local Rule 7.3(d)(1) because the body of this brief, including headings and footnotes, does not exceed 6,250 words as indicated by Microsoft Word, the program used to prepare this document.

Dated: February 2, 2022

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: February 2, 2022

/s/ Deepika H. Ravi
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, *et al.,* *Plaintiffs*, v. DALE FOLWELL, in his official capacity as State Treasurer of North Carolina, *et al.,* *Defendants*.	Case No. 1:19-cv-00272-LCB-LPA

DECLARATION OF DEEPIKA H. RAVI

I, Deepika H. Ravi, do hereby declare as follows:

1. I am more than 18 years of age, have personal knowledge of the facts set forth herein, and am otherwise competent to testify to the matters set forth herein.

2. I am an attorney at Harris, Wiltshire & Grannis LLP and counsel for Plaintiffs in the above-captioned matter.

3. I submit this declaration in support of Plaintiffs' Motion to Exclude Expert Testimony of Dr. Peter Robie.

4. Attached as **Exhibit A** is a true and correct copy of the May 1, 2021 Disclosure of Expert Witnesses Who Do Not Provide a Written Report Pursuant to Fed. R. Civ. P. 26(A)(2) by Defendants Dale Folwell, Dee Jones, and the North Carolina State Health Plan for Teachers and State Employees.

5. Attached as **Exhibit B** is a true and correct copy of excerpts of the transcript of and exhibits to the deposition of Dr. Peter Robie on September 22, 2021, taken in relation to the above-captioned matter.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated this 2nd day of February, 2022.

/s/ Deepika H. Ravi_____
Deepika H. Ravi

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:19-cv-00272

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; SAM SILVAINE; and DANA CARAWAY,	)
Plaintiffs,	)
v.	)
DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,	)
Defendants.	)

DISCLOSURE OF EXPERT WITNESSES WHO DO NOT PROVIDE A WRITTEN REPORT PURSUANT TO FED. R. CIV. P. 26(A)(2) BY DEFENDANTS DALE FOLWELL, DEE JONES, AND THE NORTH CAROLINA STATE HEALTH PLAN FOR TREACHERS AND STATE EMPLOYEES

The Rules of Civil Procedure require the Defendants to disclose witnesses who are qualified to provide expert testimony, and are expected to do so, but who are also not retained or specially employed to do so. Fed. R. Civ. P. 26(a)(2). Pursuant to the rule, the Plan Defendants disclosure that the following three individuals will present testimony within their areas of learning and expertise:

(1) Treasurer Dale R. Folwell, CPA:

Treasurer Folwell is the State Treasurer of North Carolina. Prior to his election to this office in 2016, he served as the Assistant Secretary for Employment Security of the North Carolina Department of Commerce from 2013 through 2015. From 2004 through 2011, Treasurer Folwell served in the North Carolina General Assembly. Treasurer Folwell has also earned a Bachelor's degree and a Master's degree in Accounting, and he is a Certified Public Accountant.

In his current role, Treasurer Folwell serves as Chair of the Board of Trustees for the State Health Plan. He has overall supervision of the employees who work for the Plan. In addition to testimony about his actions as Treasurer and his decisions involving the State Health Plan, Treasurer Folwell will present expert opinion testimony about the fiscal issues facing the State Health Plan.

Treasurer Folwell will testify about the role of the State Health Plan in North Carolina. The Plan provides health benefit coverage to more than 740,000 individuals and is one of the largest purchasers of health care in the State. Treasurer Folwell will testify that concerns about the fiscal sustainability of the State Health Plan have existed for

decades. Currently, Treasurer Folwell estimates that the Plan has a $28 billion unfunded liability.

Treasurer Folwell will testify about policies (both those adopted and those not yet adopted) to address this unfunded liability. These measures include premium adjustments, changes in eligibility for future retirees, and ongoing efforts to increase the transparency of health care costs. The Treasurer will contrast the lack of transparency and benchmarks for the State Health Plan with the structure of North Carolina's unemployment insurance program, which he supervised when he was an Assistant Secretary for the North Carolina Department of Commerce. The Treasurer will also testify to the inflation in health care costs resulting from the consolidation of hospital systems in North Carolina.

Finally, the Treasurer will testify to the adverse effect of the current premium structure for the Plan, which imposes significant unsubsidized costs for coverage of dependents. These costs have, for some time, discouraged younger, healthier employees from enrolling their families in the State Health Plan. Further, these costs – when combined with the rising healthcare costs experienced by North Carolina residents – have increased the economic uncertainty for all residents of North Carolina.

(2) Dee Jones, Executive Director of the State Health Plan

Dee Jones is the Executive Administrator of the State Health Plan, a position in which she has served for four years. Ms. Jones previously served as the Chief Operating Officer for North Carolina's Medicaid program. She has expertise in the administration of health benefits programs as well as operational and financial strategy and customer service within other industries. Ms. Jones has earned a Bachelor's degree in accounting and

business management from North Carolina State University and a Master's degree in Accounting and Business Management from the University of Phoenix.

Ms. Jones will testify about the operation of the State Health Plan. She is the Administrator of the Plan, responsible for implementation of policy and management of the State Health Plan, its employees, its contractors, and its vendors. She is also the individual designated by the Plan to testify on its behalf. Fed. R. Civ. P. 30(b)(6). Her testimony will include factual detail about Plan design and operation, including the coverage Exclusion challenged by the Plaintiffs.

The Defendants have also designated Ms. Jones as an expert witness to ensure that her knowledge and experience about how to operate an actuarially sound health plan are within the scope of her allowed testimony.

A portion of Ms. Jones's testimony will include opinion testimony related to the operation of the Plan. Ms. Jones will testify to the rate of increase for appropriations from the North Carolina General Assembly, the Plan's medical costs, and the Plan's pharmaceutical costs.

Ms. Jones will also testify about the cash reserves of the Plan, both the statutorily required reserves as well as the reserves necessary to ensure that the Plan can make timely payment for healthcare. She will testify as to the Plan's tracking of utilization by beneficiaries, and the analysis underlying the Plan's conclusion that a $1 billion reserve is necessary to ensure the Plan's financial soundness.

Ms. Jones will testify about the loss ratio for different age cohorts of Plan beneficiaries. She will also testify that a small portion (approximately 15% of the Plan

participants) incur 85% of the costs of medical treatment. She will testify that the maximum premium for the Plan is set by state law on a two-year cycle, limiting the ability of the Plan to adjust to changing health care costs. Further, Ms. Jones will testify that the statutory structure of the Plan – with caps on premiums for state employees and state employers and unsubsidized premiums for dependents – has skewed the Plan's population to become more elderly and more costly. This heightened cost has led to further diminution of younger participants, which negatively affects the Plan's overall loss ratio.

To ensure long-term sustainability, the State Health Plan's primary goal under her management has been to reduce the individual unit cost of healthcare. For example, the Plan has held family premiums constant even as medical costs have risen. Ms. Jones will testify to the actuarial analysis supporting the need for this policy as well as the feasibility of rejected alternatives, such as reliance on increased appropriations.

Ms. Jones will testify about the analysis performed when beneficiaries request new or augmented benefits from the Plan. Ms. Jones will testify that the Board's fiduciary obligation to the Plan beneficiaries, and concerns about overall Plan soundness, require the Board to review additional coverage benefits within the context of the effect of this additional benefit on the overall health of the Plan population. She will testify that overall cost of the new benefit is considered but that the cost of a new benefit cannot, consistent with prudential financial management, be considered in isolation. Ms. Jones will also testify about the analyses performed over the past five years, including requests that the Plan provide new or increased benefits, including coverage of gender transition costs, acupuncture, hearing aids, Colo-guard, and special dietary supplements.

(3) Peter W. Robie, M.D., FACP

Dr. Robie has served on the Board of Trustees for the State Health Plan since 2017. He also serves on the Pharmacy and Therapeutics Committee for the Plan. Dr. Robie will testify about the Board's consideration of requests that the Plan eliminate the current coverage exclusion for gender transition surgery and related hormone treatment.

Dr. Robie is not a specialist in the treatment of gender dysphoria, and the Defendants do not seek to qualify him as such. Dr. Robie is, however, a primary care physician with more than forty-seven years of experience. As a member of the Board of Trustees, and a physician, Dr. Robie has contributed his medical knowledge to Board deliberations. Dr. Robie will testify to the medical knowledge he has shared with other Board members. He will also testify that, in order to provide diagnostic and medical treatment that meets a professional standard of care, primary care physicians must know the chromosomal sex of patients.

Dr. Robie has served as a primary care physician for more than forty-seven years. He has treated patients as a physician in a small group/solo practice and as a member of a large primary care practice group affiliated with Wake Forest Medical Center. Dr. Robie earned his M.D. with honors from the Baylor College of Medicine in 1976. He has served as an Assistant Professor and Clinical Associate Professor at the Department of Internal Medicine for the Wake Forest School of Medicine since 1981.

Dated this 1st day of May, 2021.

Respectfully submitted by,

/s/ John G. Knepper

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document was served upon the following individuals through electronic mail on the 1st day of May, 2021.

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/s/ John G. Knepper

Exhibit B

VERITEXT
LEGAL SOLUTIONS

Deposition of:

Peter Robie , M.D.

September 22, 2021

In the Matter of:

Kadel, et al vs. Folwell

Veritext Legal Solutions
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Q. Did you attend college before you attended medical school?
A. Yes. Rice University in Houston, Texas.
Q. What did you study at Rice?
A. Baccalaureate of arts, English, biology. Double major.
Q. When did you graduate?
A. 1972.
Q. Did attend the Baylor College of Medicine right after that?
A. Yes.
Q. What were you studying there?
A. Doctor of medicine.
Q. When did you graduate?
A. 1976.
Q. Did you attend any other school after that?
A. No.
Q. Do you have any other degrees?
A. No.
Q. Do you have any certifications?
A. Yes.
Q. What are your certifications?
A. American Board of Internal Medicine 1979.

Q. Anything else?

A. No.

Q. Where did you work after graduating from Baylor?

A. 1979 to 1981 I was on the faculty of the department of internal medicine at Baylor College of Medicine, Houston. From 1981 to 1991 I was on the faculty, department of internal medicine, Wake Forest University Baptist Medical School. 1991 to 1997 I was in private practice at Forsyth Hospital in Winston-Salem. 1997 to 2016 I returned to Wake Forest and was a general internist in an academic group practice in Winston-Salem. I retired in 2016. Since then I've done five activities. One, I'm one of the medical directors with the community care center. We're the largest and highest rated center for the uninsured and poor in the State of North Carolina. I also attend at the urgent care centers and minor emergency rooms in Winston-Salem as needed. I'm on the county board of health for Forsyth County. And I'm also executive director for a foundation -- Sister Mary Foundation that works in the countries of Benin, the Democratic Republic of Congo to rescue war orphans from their circumstances.

Q. When you retired in 2016, did you stop practicing medicine at that time?
A. For six months.
Q. Are you currently practicing medicine?
A. Yes.
Q. What is your area of practice?
A. Internal medicine.
Q. Do you have any other specializations?
A. No.
Q. Any other areas of practice?
A. No.
Q. Are you an expert in the diagnosis of gender dysphoria?
A. No.
Q. Have you ever diagnosed a patient with gender dysphoria?
A. No.
Q. Are you an expert in the treatment of gender dysphoria?
A. No.
Q. Have you ever treated a patient for gender dysphoria?
A. No.
Q. Are you an expert in the cost of treatment for gender dysphoria?

A. No.
Q. Have you ever submitted a request for pre-authorization for insurance coverage for gender concerning care?
A. No.
Q. Have you ever communicated with an insurer regarding a denial of coverage for gender confirming care?
A. No.
Q. Have you ever taught medicine?
A. Yes.
Q. Where did you teach?
A. Baylor College of Medicine, Wake Forest Baptist Medical Center.
Q. At Baylor what were you teaching?
A. General internal medicine.
Q. Did you teach anything else at Baylor?
A. No.
Q. What about at Wake Forest?
A. General internal medicine.
Q. Either at Baylor or at Wake Forest did you teach on the subject of gender dysphoria?
A. No.
Q. Have you ever taught on that subject?
A. No.

Q. Have you ever been published in the area of gender dysphoria?
A. No.
Q. Have you ever conducted research on the treatment of gender dysphoria?
A. No.
Q. Have you ever read medical literature on the subject?
A. Yes.
Q. What literature have you reviewed?
A. Psychology article journals, I can't remember the names of them, but many related to the provision of psychological support for people with gender dysphoria. I've also read recommended guidelines of the American Medical Association, similar other organizations I can't recall, on the management of gender dysphoria.
Q. When did you review this literature?
A. In the last six months.
Q. Do you recall the authors of the literature you reviewed?
A. No.
Q. Do you recall the dates any of it was published?
A. I think the psychology one I read was in

December of 2020.

Q. Do you recall the title of that article?

A. No.

Q. Do you recall any other medical literature that you have reviewed on the subject of gender dysphoria?

A. No.

Q. Have you ever peer reviewed any literature on the subject of gender dysphoria?

A. No.

Q. Are you currently serving on the board of trustees for the North Carolina State Plan Insurance for Teachers and State Employees?

A. Yes.

Q. If I refer to that as the plan today, will you know what I'm talking about?

A. I'm sorry, I didn't hear your question.

Q. If I refer to the North Carolina State Health Plan for Teachers and State Employees as the plan today, will you know what I'm talking about?

A. Yes.

Q. How long have you served on the plan board of trustees?

A. Since February 2018.

Q. What are your responsibilities as a

or modifications?

A. Yes.

Q. Do you see that language on the page there, about two-thirds of the way down?

A. Yes, I see it.

Q. I will ask you to turn to the page marked PLAN DEF2699.

A. We're on that page.

Q. Are you aware that in the 2016 plan year the plan excluded from coverage psychological assessment and psychotherapy treatment in conjunction with proposed gender transformation?

A. Yes.

Q. If I refer to these exclusions from coverage as exclusions today, will you know what I'm talking about?

A. Yes.

Q. Do you know Treasurer Dale Folwell?

A. Yes.

Q. How do you know Treasurer Folwell?

A. We've been friends since the 1980s, and I know him in his capacity as the treasurer of the State of North Carolina and director of the State Health Plan along with Dee Jones as assistant.

Q. You said you've been friends since the

1990s. How long have you known Dale Folwell?

MR. WILLIAMS: Objection to the form.

A. Since the 1980s. 40 years.

Q. Where did you first meet?

A. He came in as a patient. He's been a patient of mine.

Q. I will ask you to take a look at what's been marked as Exhibit 2.

(Exhibit 2, Disclosure of Expert Witnesses, marked for identification, as of this date.)

Q. Have you seen this document before, Dr. Robie?

A. Yes.

Q. Would you turn to page 6 of this document.

A. Okay.

Q. The document states, "Dr. Robie will testify about the board's consideration of request that the plan eliminate the current coverage exclusion for gender transition surgery and related hormone development." Is that correct?

A. Yes.

Q. What testimony can you provide on this

topic?

A. I'm sorry, I didn't hear you.

Q. What testimony can you provide on this topic?

A. Can you be more specific in your question?

Q. What testimony can you provide about the board's consideration of request that the plan eliminate the current exclusion?

A. The cost of the gender transition surgery and related hormone treatment.

Q. What request did the plan receive for eliminating the current exclusion?

A. I don't know.

Q. Do you know what the plan considered in terms of whether to eliminate the exclusion or not?

A. Are you referring to discussions that occurred in 2016?

Q. Are you aware of discussions that occurred in 2016?

A. No.

Q. What about in 2017?

A. No.

Q. In 2018?

A. I think by then the plan excluded the

gender dysphoria treatment so I don't think we had any discussions about eliminating it, it was already not part of the plan package.

Q. Were there any discussions about eliminating the exclusion in 2018?

A. No.

Q. In 2018, did the plan receive any requests to lift the exclusion?

A. Yes.

Q. From whom?

A. Mr. Kadel and some other people in our board meeting, I believe it was October, November, December of 2018 when the public part of our board meeting made a presentation requesting we cover treatment for gender dysphoria.

Q. When was that presentation?

A. I believe October 2018.

Q. Who was giving that presentation?

A. There was a group. There was an attorney present. I do recall Mr. Kadel. I don't recall the other individuals, but there were about four or five others.

Q. In 2018, do you recall any other requests that the plan received to lift the exclusion?

MR. WILLIAMS: Objection to the form of the question. You can answer.

A. No.

Q. What was the board's consideration of the request it did consider?

A. Really, at that time there was no discussion other than hearing what Mr. Kadel and the other people had to say. The board didn't have any more discussion.

Q. Was there any internal deliberation following that meeting in October 2018?

A. At that time or any time since then?

Q. Let's start with at that time.

A. No.

Q. What about since then?

A. I recall two episodes. Ms. Kim Hargett who was a board member bringing up --

MR. WILLIAMS: Dr. Robie, let me caution you. To the extent that these discussions occurred outside the presence of counsel in open session, I think it's perfectly fine and appropriate for you to testify to. To the extent that any discussions occurred in closed session within the presence of counsel, I'm going to instruct

you not to answer those questions.

A. Okay. Well, those were closed sessions so I will not answer.

Q. To clarify, those were closed sessions you're referring to after October 2018?

A. Yes.

Q. Is there any other testimony you can offer about the board's consideration or request that the plan eliminate the exclusion?

A. No.

Q. Turning back to page 6 of the document, it states, "As a member of the board of trustees and as a physician, Dr. Robie has contributed his medical knowledge to board deliberations. Dr. Robie will testify to the medical knowledge he has shared with other board members."

Is that correct?

A. Yes.

Q. What medical knowledge have you shared with other board members?

A. Most recently, the coverage of continuous glucose monitors for diabetic patients.

Q. Anything else?

A. Some discussion of the biological agents for cancer treatment.

Q. Any other medical knowledge you've shared since joining the board?
A. Not that I recall.
Q. How did you share this information with other board members? Was it at a board meeting?
A. Yes.
Q. Which board meeting was it at?
A. Continuous glucose monitors has been over the last three or four board meetings as an agenda item.
Q. What about the information regarding cancer treatment?
A. Those were agenda items for board approval to cover the medicines.
Q. Were there any other board meetings where you shared this information?
A. No.
Q. What about outside of board meetings?
A. No.
Q. Apart from the information regarding diabetic treatment and cancer treatment, is there any other medical knowledge that you have shared with the board since joining the board of trustees?
A. I'm sure there has been, I just can't recall the specifics today.

Q. If anything else comes to mind today, will you let me know?

A. Yes.

Q. With which board members did you share this information?

A. All the board members in attendance at the meetings that I talked.

Q. With regard to the medical knowledge you have shared with other board members, is there any other testimony that you could provide on this topic?

A. No.

Q. Staying on page 6 of the document, it states that you will testify, "In order to provide diagnostic and medical treatment that meets a professional standard of care, primary care physicians must know the chromosomal sex of patients." Is that right?

A. Yes, I see it.

Q. What expert testimony can you provide on this topic?

A. Situations where it would be important for the treating provider to know the chromosomal sex of a patient.

Q. When is it important for a treating

the patient for the three conditions you mentioned here?

A. I would be more concerned about ovarian, uterine cancers in a chromosomal female. Chromosomal male would be testicular cancer. The potential workup and treatment with each condition is very different.

Q. How would that affect the care you give to the patient?

A. Delay in diagnosis.

Q. Is there anything else that affects the care you give the patient?

A. No.

Q. In your practice, do you confirm the chromosomal makeup of your patients?

A. No.

Q. When did you first form the opinion that primary care physicians must know the chromosomal makeup of their patients?

A. When this case was brought up. When I say case, I mean the legal action that you are a part of.

Q. Do you recall the year?

A. Of this individual that I saw?

Q. I'm sorry, I didn't catch that.

A. Would you ask the question a little more specifically, I'm sorry.

Q. You said that you formed the opinion that physicians must know the chromosomal makeup of their patient when this case was brought up. Do you recall the year that you formed that opinion?

A. It was the year the case was filed. So I'm going to guess 2019.

Q. Apart from what you mentioned in terms of delayed diagnosis, are there any other harms that you believe stem from primary care physicians not knowing their patients' chromosomes?

A. No.

Q. We've been going for about a half-hour now. Let's take a quick five-minute break and return in five minutes.

A. Okay.

MS. RAVI: Off the record.

(Recess taken.)

MS. RAVI: Before we proceed, will counsel for the defendant stipulate that the board intends to maintain its attorney/client privilege as to the closed sessions that occurred at board meetings in October 2018 and thereafter?

MR. WILLIAMS: Yes.

Q. Dr. Robie, turning back to page 6 of Exhibit 2, do you still have that in front of you?

MR. WILLIAMS: Let me log back in.

A. Okay, I have it.

Q. With regard to the statement that, "Dr. Robie will testify about the board's consideration of request that the plan eliminate the current coverage exclusion for gender transition surgery and related hormone development," other than what we've discussed today, is there any other testimony that you intend to offer on this topic?

MR. WILLIAMS: Objection to the form of the question.

A. The cost of the procedures.

Q. Anything else?

MR. WILLIAMS: Same objection.

A. No.

Q. Moving down, the document states, "Dr. Robie has contributed his medical knowledge to board deliberations. Dr. Robie will testify to the medical knowledge he has shared with other board members."

Other than what we discussed today regarding your discussions on treatment for patients

with diabetes and cancer treatment, is there any other testimony you intend to offer on this subject?

MR. WILLIAMS: Objection to the form.

A. COVID management, plan for COVID care, the status of COVID in the country, state. I mentioned earlier, I'm on the Forsyth County Board of Health so I'm in the loop, if you will, with boards of health, CDC and other agencies such as the State Department of Health and Human Services. So that was another topic I've spoken on to the board.

Q. Anything else?

A. No.

Q. With regard to your testimony that in order to provide diagnostic and medical treatment that meets the professional standard of care, primary care physicians must know the chromosomal sex of patients, with regard to that issue, apart from the examples you mentioned regarding treatment of patients with hemophilia, contacting patients' families and your own experience with a patient in the mid '90s, is there any other testimony that you intend to offer on this topic?

MR. WILLIAMS: Objection to the

form.

A. No.

Q. Dr. Robie, are you familiar with the World Professional Association for Transgender Health Standards of Care for Treatment of Gender Identification Disorder?

A. Yes.

Q. Do you have a position on the validity of those standards of care?

A. No.

Q. Are you familiar with the American Medical Association's Resolution 122 issued in 2008?

A. May I see it?

Q. Are you familiar with it?

A. I believe, yes.

Q. What is your understanding of that resolution?

A. I can't recall.

Q. Are you familiar with the DSM 5, the diagnostic and statistical manual of mental disorders definitions?

A. No.

Q. Are you familiar with the Endocrine Society Clinical Practice Guidelines on Treatment of Gender Dysphoria Or Gender Incongruent Persons?

A. No.
Q. If you could please take a look at what's been marked as Exhibit 3.
(Exhibit 3, PLAN DEF0028665, marked for identification, as of this date.)
MR. WILLIAMS: Okay.
Q. Have you seen this document before?
A. Yes.
Q. What is this document?
A. It's a statement from Treasurer Folwell, coverage of sex change operations.
Q. Did you discuss the statement with Treasurer Folwell?
MR. WILLIAMS: Objection to the form.
A. Before its release or after its release?
Q. Let's start with before its release.
A. No.
Q. Did you discuss this statement with Treasurer Folwell after its release?
A. The only discussion that I recall that the board with me being on the board was that any further discussion with people not on the board would come through Treasurer Folwell's office, not from us as individuals.

Q. Apart from the statement itself, did you discuss any of the content of the statement with Treasurer Folwell?

MR. WILLIAMS: Objection to the form.

A. No.

Q. Have you ever had a conversation with Treasurer Folwell regarding the medical necessity of gender confirming care?

A. No.

Q. Can gender confirming care ever be medically necessary for a patient?

A. That decision is made by the provider, patient's physician, and the patient together. The medical necessity is determined really at that level. To me, when the guidelines are issued by organizations such as the American Medical Association and the Society and so on, they are guidelines. The medical necessity is not determined by the guidelines, it's determined by the provider and the patient.

Q. Is there ever a circumstance where a provider and patient together could determine that gender confirming care is medically necessary?

MR. WILLIAMS: Objection to the

form.

A. I don't know.

Q. Going back to Exhibit 3, other than Treasurer Folwell, did you discuss the contents of this statement with anyone else?

A. No.

Q. Are you familiar with the Segal Company?

A. No.

Q. Are you aware of the total cost that the plan incurred for covering gender confirming care in 2017?

A. No.

Q. I will ask you to take a look at what's been marked as Exhibit 4.

(Exhibit 4, PLAN DEF0038905, marked for identification, as of this date.)

A. Okay.

Q. Are you familiar with this document, Dr. Robie?

A. Yes.

Q. What is this document?

A. It's an e-mail on our last board meeting sharing my thoughts about several e-mails that plan members had sent to the board since their last meeting.

Q. This e-mail was sent by you on August 26, 2018; is that correct?
A. Yes.
Q. It was sent to Treasurer Folwell and to Dee Jones?
A. Yes.
Q. Your e-mail states you looked into the cost of covering transgender surgery by the State Health Plan; is that correct?
A. Yes.
Q. What did you look into?
A. I looked at the cost using my browser search engine on the potential cost of transgender surgeries and potentially how much that cost would be to the plan.
Q. What sources did you review?
A. I'm sorry, what websites?
Q. Yes. Let's start with websites. What websites did you review on this issue?
A. I don't recall.
Q. Do you recall how many websites you looked at?
A. Five or six.
Q. Do you recall any of the authors of the contents you looked at?

A. No.

Q. Do you recall any of the dates that content was made available?

A. After our board meeting -- really before our board meeting, in October 2018, and I looked at it after Treasurer Folwell released the in statement Exhibit 3, and then I reviewed it last week.

Q. Is it correct that as of the date of your e-mail, August 26, 2018, you had already looked at those five to six websites?

A. Yes.

Q. Do you recall anything else about the websites you looked at?

A. No.

Q. Other than websites, did you look into any other sources regarding the cost of covering transgender surgery by the State Health Plan?

A. I looked at what the city of San Francisco plan was for covering transgender surgery at that time.

Q. You said that was the San Francisco plan?

A. The city of San Francisco, yes.

Q. How did you get that information?

A. Just search on my browser.
Q. Was that one of the five or six websites you looked at?
A. Yes.
Q. What did you learn about the San Francisco plan?
A. That up until, I believe, 2012 San Francisco was giving plan members requiring gender dysphoria treatment care a plan amount of money per year and capped it at that amount of money. I don't remember what the amount was. But the follow-up study that I did showed that they dropped that and now provide full coverage.
Q. I'm sorry, I didn't catch that last sentence.
A. A follow-up study of the plan showed that they had dropped that plan amount and now provided full coverage for gender dysphoria.
Q. Did you review that follow-up study?
A. It wasn't a study, it was just a public release by the city health plan.
Q. With regard to your own searches into the cost of covering this treatment, other than the five to six websites you looked at, were there any other sources that you looked at to learn this

information?

A. No.

Q. Your e-mail states that you were told the average cost of this surgery was on the average of $142,000; is that correct?

A. Yes.

Q. Who told you that?

A. The websites.

Q. Do you recall which website had that figure?

A. No.

Q. Does this $142,000 refer to surgery for a transgender male or transgender female?

A. I believe it was not differentiated that I recall.

Q. What surgical procedures would be included in this $142,000 amount?

A. I believe I counted 20. I'm trying to remember what they were. Scalp surgery, eye surgery, eyebrow surgery, forehead surgery, ear surgery, two nose procedures, one on the bridge of the nose, one on the nose itself, lip surgery, chin surgery, cheek surgery, Adam's apple surgery, breast augmentation or breast removal surgery, genital surgery, surgery on the buttocks and on the

hips, one's going male to female to get the hour glass shape to the top of the body. Those are the surgeries. There are also websites included in the cost. Speech therapy to speak more like the opposite sex. Walking therapy. And then, of course, psychological therapy and medication coverage.

Q. Those are the surgical procedures that would be included within this $142,000 average cost?

A. Yes.

Q. Are there any other surgical procedures that you --

A. There may be, I don't know if there are any more but there may be.

Q. You stated that you were told there is an additional cost of 71,000 for breast augmentation for male to female transgender surgery; is that correct?

A. I think that was -- the answer is yes, I was for people that just wanted that surgery. From what I gathered reading websites, not all transgender individuals want all 20 operations. They want certain operations and not others. So if they're getting just that, that's the cost I saw quoted.

Q. So to clarify, you mentioned earlier that the $142,000 figure could include breast augmentation surgery. Is that cost included within the 142,000 or is that a separate $71,000 cost --

A. That's included in the cost of the 142,000.

Q. Are there any other surgeries that you are aware of that would go into this cost that you were referencing in October 2001?

A. The electrolysis for hair removal.

Q. Anything else?

A. No.

Q. With regard to the cost of breast augmentation surgery, other than the information that you learned from these websites that you looked at, have you ever otherwise researched the cost of the surgery yourself?

A. No.

Q. Have you ever consulted with other medical providers on how much that particular surgery might cost?

A. For gender dysphoria or any other conditions?

Q. Let's start with just gender dysphoria.

A. No.

Q. What about for other conditions?
A. It's really determined by the insurance coverage.
Q. How is the cost of the surgery determined by the insurance coverage?
A. I don't know.
Q. So there's a particular cost of surgery for the surgery and that surgery is determined by a process that includes consideration of insurance coverage?
A. Yes.
Q. But you're not aware of how the insurance coverage plays into the determination of the cost?
A. Yes.
Q. I will ask you to please take a look at what's been marked as Exhibit 5.
(Exhibit 5, PLAN DEF0033668, marked for identification, as of this date.)
A. Okay, I have it.
Q. Are you familiar with this document?
A. Yes.
Q. Is this an e-mail exchange between you, Treasurer Folwell and Dee Jones on October 25, 2018?
A. Yes.

Q. You stated that you were asked by a reporter for an interview about the board's attitude about coverage for transgender surgery; is that correct?

A. Yes.

Q. You responded that in the interview you had focused on the cost of the surgery and how we are trying to control cost; is that right?

A. That's what I said. The interview did not take place.

Q. When you referred to, "We are trying to control cost," who were you referring to there?

A. The State Health Plan.

Q. At this time in October 2018, what was your understanding of the cost of surgery for gender confirming care?

A. The numbers that we just discussed, 142,000.

Q. And those numbers were based on research you did prior to your August 2018 e-mail exchange that we just looked at?

A. Yes.

Q. Was there any other time when you researched the cost of gender confirming care?

A. No.

Q. Have there been any other sources that you have consulted regarding the cost of gender confirming care?

A. No.

Q. I will ask you to take a look at what has been marked as Exhibit 6 please.

(Exhibit 6, PLAN DEF0079132, marked for identification, as of this date.)

A. Okay.

Q. Have you seen this document before?

A. No.

Q. Does this appear to be a compilation of articles mentioning or relevant to the North Carolina State Department of the Treasurer circulated on October 25, 2018?

A. Yes.

Q. Around October 22, 2018, did you attend a board of trustees meeting?

A. I don't remember.

Q. You mentioned earlier regarding the board's consideration of request to lift the exclusion that there was some testimony at a meeting around October 2018. Do you recall that?

A. Yes.

Q. Was that a board of trustees meeting?

A. It was an open public session of the board of trustees meeting, for the public to make presentations.

Q. Do you recall speaking at that meeting?

A. Yes.

Q. Did you speak about your own experience with the cost of surgery for gender confirming care?

A. Yes.

Q. Did you speak on any other subject at that meeting?

A. At the open public session?

Q. Yes.

A. Not that I recall.

Q. What did you say about your own experience with the cost of surgery for gender confirming care?

A. Several years before I had a transgender male that had no insurance, was at an age where if he was going to have the transgender surgery he figured that would be the time to do it, the issue was approaching so we looked into the cost, what we thought would be the cost for him with that insurance to have the surgery. At that time, I came up with that figure of 140,000 roughly. And when he heard that, he decided not to proceed

further.

Q. What was the year in which you were having that conversation with the individual thinking about surgery?

A. I don't recall.

Q. It was sometime prior to 2018?

A. Yes.

Q. Do you recall approximately how long prior to 2018 you had that discussion with a patient?

A. It would be a guess, but I would guess 10 years.

Q. If you could turn to the page marked PLAN DEF 79138.

A. Yes. I have it.

Q. The first two paragraphs under "De Minimus," is that an accurate representation of your statements at that October 2018 meeting?

A. To my memory, yes.

Q. Your statement that the cost for uninsured patients for counseling, medication, surgery and follow up was $140,000, how did you come to an understanding of those costs?

A. We did a browser search, and I believe I checked with the Duke Medical Center Transgender

Center which I believe was operational at that time for uninsured patients, those were the numbers I recall being quoted.

Q. Was this browser search separate from the search we discussed prior to your August 2018 e-mail?

A. Yes.

Q. When did you do this browser search?

A. 2008.

Q. 2008?

A. Yes.

Q. What websites did you review in your search in 2008?

A. I don't remember.

Q. Were there any other sources you reviewed in 2008?

A. No.

Q. With regard to your outreach to -- you said it was the Duke Medical Center?

A. To my memory, yes.

Q. Was that also in 2008?

A. Yes.

Q. Who did you talk to there?

A. I didn't. I looked at their website.

Q. What did their website say about the

cost for counseling, medication, surgery and followup?

A. For uninsured patients, that was the number that was provided to my memory.

Q. Were there any other sources that you consulted to get to this estimate of $140,000?

A. No.

Q. Other than the search you conducted in 2008, and the search we discussed that you conducted prior to your e-mail in August 2018, was there any other time that you researched the cost of gender confirming care?

A. Yes.

Q. When was that?

A. Yesterday.

Q. What did you look at yesterday?

A. Websites.

Q. Which websites did you look at yesterday?

A. I looked at several. The one that comes to mind was the Philadelphia Center for Gender Translational Surgery -- that may not be a totally accurate rendition, but it was Philadelphia based transgender surgical site.

Q. Any other websites that you looked at

yesterday?

A. I did, but I don't recall their names.

Q. Do you remember how many websites you looked at yesterday?

A. Three.

Q. One was the Philadelphia center and two others?

A. Yes.

Q. Other than in 2008, around August of 2018, and yesterday, any other time you looked into the cost of gender confirming care?

A. No.

Q. Let's go back to PLAN DEF 7913. Do you still have that in front of you?

MR. WILLIAMS: 79138?

MS. RAVI: That's right.

MR. WILLIAMS: Yes.

Q. At the October 2018 meeting, did you also state that the cost for male to female transgender breast augmentation was $60,000?

A. Yes.

Q. How did you come to the understanding of that cost?

A. My memory is that that was the cost quoted at one of the websites for uninsured

patients.

Q. Was that one of the websites you looked at in 2008?

A. No.

Q. When did you look at that website?

A. The one we're talking about that I just mentioned in this document?

Q. That's right.

A. In October 2018.

Q. In October 2018, were you researching the cost of gender confirming care?

A. Yes.

Q. Was this separate from what you had looked at in August of 2018?

A. I believe it was the same browser search, clicking on websites, it may have been different websites.

Q. Do you remember which website had this information?

A. No.

Q. Other than the websites we've discussed, is there any other source that you have consulted with regarding the cost of gender confirming care?

A. No.

MR. WILLIAMS: Objection to the

form of the question.

A. No.

Q. Have you spoken with anyone about this cost?

A. No.

Q. Regarding the statement that the cost for an insured patients for counseling, medication and surgery and followup was $140,000, what is the counseling referred to in your statement?

A. Pre-surgical counseling for a year and counseling after the surgery.

Q. How much does that counseling cost?

A. I don't remember.

Q. Are you aware of whether the plan currently covers counseling for treatment of gender dysphoria?

A. I believe they do not.

Q. With regard to the medication referred to in your statement, what medication is being referred to there?

A. Hormone therapy.

Q. Any other medication?

A. Psychiatric medication, antidepressants.

Q. Anything else?

A. Not that I can think of.

A. I don't remember.
Q. Do you remember when you received that information?
A. No.
Q. In your statement you refer to followup. What is that followup you're referring to?
A. Surgical followup for potential complications from the surgery plus psychological followup.
Q. Are you aware of the prevalence of individuals in North Carolina who identify as transgender?
A. Last night when I was reading one of the websites for cost, I think I saw the figure estimated of 45,000 individuals in the State of North Carolina that are transgender.
Q. Which website was that?
A. I don't remember.
Q. When did you look at that website?
A. Yesterday.
Q. So this was one of the three websites you reviewed yesterday?
A. Yes.
Q. Do you remember the author of the material you looked at?

A. No.
Q. How long did you spend reviewing that website?
A. I don't remember.
Q. Are you familiar with the number of North Carolina State Health Plan members who are expected to use coverage for gender dysphoria?
MR. WILLIAMS: Objection to the form of the question.
A. No.
Q. Yesterday when you were looking at the three websites you mentioned, how long did you spend looking at them?
A. Half an hour.
Q. You mentioned that you also looked into this issue in around August of 2018. Do you recall how long you spent looking into the issue at that time?
A. No.
Q. What about in 2008?
A. I don't remember.
MS. RAVI: Off the record.
(Discussion off the record.)
Q. Dr. Robie, are you aware of whether the plan negotiates rates with medical providers?

the hospital, total cost for each procedure.

Q. What were the procedures listed on the Philadelphia website?

A. Pretty much the ones that I mentioned earlier. Do you want me to go through them again?

Q. Yes, please.

A. Scalp surgery, eye surgery, eyelid surgery, forehead surgery, eyebrow surgery. Two nose operations, bridge of the nose and the nose itself. Teeth surgery, chin surgery. Ear surgery. Adam's apple surgery. Breast augmentation or removal surgery. Genital surgery. Surgery on the buttocks and hip to get the hour glass figure for female. And I forgot -- electrolysis for hair removal.

Q. Are you aware whether these procedures were covered in 2017 by the plan?

A. No. I don't know.

Q. Are you aware of whether any of the procedures you just mentioned were not covered by the plan in 2017?

A. I don't know.

Q. With regard to your estimate of $140,000, does that cover all of the procedures that you just mentioned?

MR. WILLIAMS: Objection to the form.

A. It covers the procedures, I don't recall if it also covers the counseling and the hormone therapy. I think it did not. These were surgical procedures.

Q. Are you aware of whether a person seeking gender confirming care would receive all of the procedures that you just listed?

MR. WILLIAMS: Objection to the form.

A. From what I saw on the websites, some choose a few procedures, it's very patient specific.

Q. So is it the case that a person seeking gender confirming care might not choose all of these procedures?

A. Yes.

Q. But the cost of them, your understanding based on the websites you reviewed is that the cost of all these procedures together totals $140,000?

A. The one in Philadelphia yesterday was 184,000. One would assume that if the plan covered transgender surgery, we would have a mix of patients wanting a few procedures, moderate number

firm Bell Davis & Pitt and I'm one of the attorneys for Mr. Folwell, Ms. Jones and the State Health Plan.

With apologies to everybody, I will bounce around a little bit to clean up some areas.

EXAMINATION BY

MR. WILLIAMS:

Q. Dr. Robie, I will start by asking you this question. We looked at some -- an e-mail earlier where Treasurer Folwell used the word elective. We talked a little bit about medical necessity. And I wonder if you can just provide some context as to what that means to you as an internist and someone who has been practicing in the medical field for over 40 years?

A. Well, it's an issue I deal with everyday. I mentioned earlier, I'm one of the medical directors of the community care center plus I work in the urgent care centers and minor emergency rooms in Winston-Salem. I've been working several days this month and will work everyday at the end of the month. We have people come in with COVID, with low oxygen levels, that's an emergency, that's not an elective problem,

that's something that needs to be addressed right then and there, and we do that. As opposed to somebody coming in with, relevant to what we're talking about, need for plastic surgery procedure, that's not something that needs to be done to save your life that day. That's something that is elective which means it could be scheduled at an opportune time for the patient and surgeon. As you probably know, many medical centers have actually had to hold off on elective surgery because of the COVID crisis. Transgender surgery would fall in that category, elective, wait until the COVID crisis calms down before they will proceed.

The only thing about elective surgery, we're talking plastic surgical procedures in transgender surgery, and you're cutting across normal tissue, really you're treating a psychological issue, major psychological issue, by cutting on normal tissues. So you're having an elective procedure where you're cutting on normal tissues to treat a psychological condition that could be very significant, but I just want the surgical procedure to be viewed in that mindset.

You know, I've been the head of -- one of the medical directors for the community care

the same kind of numbers. That's what's surprising to me, that the cost is, to me, very high.

Q. Dr. Robie, remind us how long have you been a practicing physician?

A. Since 1976. 45 years.

Q. I believe your testimony was that in 2008 you probably spent about an hour doing this internet research, same thing for 2018, maybe about an hour doing this research, and then yesterday you spent maybe 30 minutes; is that correct?

A. Right.

Q. So based on your 45, 46 years of experience as a physician, combined with the research -- internet research that you did, did you -- were you able to reasonably conclude that those figures that you were using were pretty close?

A. Yes.

Q. Did you determine that the websites that you were visiting and information that you were gathering were both reasonable and reliable to lead you to conclude that those cost approximations were reasonable and accurate?

A. Yes. What struck me is how the numbers haven't changed. Over 13 years.

Q. One thing we haven't touched on today

is, as a physician, your concerns potentially about adolescents receiving transgender treatments. Can you speak a little bit to that?

A. Well, yes. The human brain in an adolescent is not fully developed. I think the current thinking is that in young women, the brain is fully developed by age 21, and the young male or young man would be 25 before the brain is fully developed. So looking at an adolescence brain, it changes dramatically from year to year. To have an adolescent undergo irreversible drug treatment or surgery for gender dysphoria to me is really not ethically appropriate because who you're talking to at age 16 may be different at age 18.

I have a little personal experience with that. I was friends, not the doctor, but I was friends with a couple who had a child at age 16 undergo transgender surgery, graduated high school, went off to college. After a year, had to be treated for severe depression, at age 19 had to hospitalized. One of the issues that caused the depression was that the transgender may have been a mistake. That's got to happen. I don't know that the -- I guess publicized, but it's common sense is going to tell you when you deal with an age group

for counseling as a measure of success goes up after transgender surgery, and if you're doing operations mainly for psychological benefits and then your counseling needs to increase after the surgery, are you really succeeding. I think that's what he is quoting about some uncertainty.

Q. Do you recall having a specific conversation with Treasurer Folwell about this concept of medical uncertainty has never been greater in or around October 2019?

A. I may have, but I don't recall it as I sit here at the moment.

Q. So you don't recall a specific conversation but it's certainly possible?

A. It's possible. But my emphasis is the cost of the procedure, trying to have a fiduciary duty of prudence to the plan members, to spend that much money on a small group of individuals versus spending that money on a large group of individuals before proving benefit is my concern.

Q. Last topic I think.

I want to take you back, teleport you back to October 2018 and the board meeting where Mr. Kadel and others made presentations during the public session to the board meeting.

A. Yes.

Q. The best you can recall, I would like for you to recount for the group what that presentation, what you recall from that presentation and what you recall saying to these folks who were presenting and to the rest of the board in the open session of the board meeting.

A. I do recall there was a group, I think there was about five of them, they had an attorney. I believe the attorney made an opening statement requesting that the board of trustees approve covering for transgender surgery. Mr. Kadel then came and talked. My memory is that he spoke very eloquently. I think he was a music major at UNC. That's my memory. But he was very eloquent in what he was saying. In that mix was a mother and father talking on behalf their teenage child to have transgender surgery. I believe the mother was a nurse, if my memory serves, or in the medical healthcare field I think, was a little more upset that it was not covered.

After the board meeting was over with, that group had a press conference, some people of the press there, I was not party to what they were saying, they did talk to the press afterwards, I

think the attorney was the main one I recall talking to the press, and they had the group picture taken. That's what I recall.

Q. Do you remember addressing the group of presenters during open session?

A. Yes. About the fact the person I had in 2008 searching for the cost for an uninsured person to have transgender surgery, female to male, that's where I got those numbers originally. They took one look at that and said it's too much money, I don't have it.

Q. That's the testimony that you gave earlier about the cost?

A. Right.

Q. Dr. Robie, I'm going to refer you to Exhibit 5.

A. Okay.

Q. I want to refer you to two e-mails in this chain. There's an original e-mail from you, this is at the bottom of the page, that e-mail is from you to Treasurer Folwell with a copy to -- we can't see but presumably it's a copy to Dee Jones, and Mr. Folwell responds to you and we can see the response is copied to Dee Jones; correct?

A. Right.

Q. Your e-mail is October 25, 2018 at 9:40 a.m. This is when you had been approached by North Carolina Policy Watch for an interview that you testified earlier never happened; is that correct?

A. Correct.

Q. My only question with respect to this e-mail is the very last part, the last sentence, it says, "Let me know if you were okay with this PR." What does PR mean in that e-mail?

A. Those are my initials, Pete Robie. It doesn't mean public relations, it means PR, Pete Robie. Those are my initials.

MR. WILLIAMS: Off the record.

(Recess taken.)

Q. Dr. Robie, thank you for your time today and we have no further questions.

MS. RAVI: Off the record.

(Recess taken.)

FURTHER EXAMINATION

BY MS. RAVI:

Q. Dr. Robie, I have just a few follow up questions for you. You were discussing earlier elective treatment and you gave an example of life saving treatment that was not elective. Is it the case that elective surgery is something you consider

doctor, provider and the patient, medical necessity. So the answer is it depends on doctor/patient relationship to make that relationship.

Q. So is it correct that some elective care can be medically necessary as determined by the doctor/patient --

A. If that's determined, the answer is yes.

Q. You also testified earlier regarding knowledge of chromosomal makeup of patients.

A. Correct.

Q. In your practice, do you ask your patients about their gender identity?

A. They are now asked as a standard screen on intake, every patient. We use the Epic electronic medical record and they do have a section on just that question. What do you consider your identity. Cis male, cis female, trans male, trans female. There are so many variations I forget what the others they ask. Not sure. But that question is standard. So the answer is yes, all of them are asked.

Q. When did you start asking your patients that question?

MR. WILLIAMS: Objection to the

form of the question.

A. It was not up to me to make that decision, it was up to the Wake Forest Baptist Medical Center and the Novant Health System -- Epic updated their software to include those questions when that happened. I don't recall. But I know it's been asked for several months now.

Q. I'm sorry, did you say several months now?

A. Yes.

Q. Do you ask your patients in your practice about their chromosomal makeup?

A. Only if the nurse says I need to. I can't recall recently where I've been asked to do that.

Q. When does a nurse tell you that you need to?

A. If the patient's not comfortable expressing that they're trans male or trans female to the nurse. You know, a lot of human communication is non-visual. So the patient may say I'm a cis male but the way they say it to the nurse that there's some uncertainty about this, so, Dr. Robie, would you follow-up on that and try and establish what's going on.

Q. Separate from asking patients about their gender identity, do you ask patients about their chromosomal makeup?

A. No.

Q. Are you aware of whether emergency rooms perform chromosomal testing before providing care?

A. Well, the chromosomal testing is not a quick test. I think it's 24, 48 hours. If they order it, it won't be any help if they have an immediate emergency, life threatening emergency.

Q. So is it the case then that an emergency room would not provide that test before providing emergency care?

A. Yes.

Q. You've been practicing as a primary care physician for 45 years; is that correct?

A. Yes.

Q. In that time, how many transgender patients have you treated?

A. That I've knowingly treated. Four come to mind. But I'm sure there were others that I was not aware were transgender.

Q. Of those four, how many were adults?

A. All four.

Q. Have you ever treated a transgender

adolescent?

A. No.

Q. Have you ever treated a transgender child?

A. No.

Q. Thank you very much. I have no further questions.

MR. WILLIAMS: Nothing further from me.

MR. MCINNES: No questions on behalf of the North Carolina Department of Public Safety.

THE REPORTER: Would you like a copy of the transcript, Ms. Ravi?

MS. RAVI: Yes, please.

THE REPORTER: Would you like a copy of the transcript, Mr. Williams?

MR. WILLIAMS: Just however they have been sent before, yes.

THE REPORTER: Would you like a copy of the transcript, Mr. McInnes?

MR. MCINNES: Yes, e-Tran please.

(Deposition concluded at 1:07 p.m.)

(Signature reserved)

From: Peter Robie <pwrobie@gmail.com>
Sent: Sun, 26 Aug 2018 10:55:01 -0400
To: Dee Jones <dee.jones@nctreasurer.com>
CC: Dale.Folwell@nctreasurer.com
Subject: Emails since our last board meeting

Exhibit 04

I'd like to share some thoughts on several emails members have sent to the board since the last meeting, in preparation for the meeting this Thursday. An early email was limiting the cost of an insulin pump for juvenile diabetics. The writer implied that juvenile diabetics were not at fault for their diabetic state as opposed to adult onset diabetics. I think if a deductible change is made for insulin pump diabetics it should apply to all diabetics not just juvenile onset diabetics. I suspect this would be cost prohibitive and not an option the board should pursue. On a similar line there was a request to cover transgender surgery by the state health plan, claiming not doing so was discriminatory. I looked into the cost of such surgery and was told it was on average $142,000, with an additional cost of $71,000 for breast augmentation for male-to-female transgender surgery I don't think the plan can absorb such costs and I think we should decline coverage because of this. I got the impression there may be legal action taken against the state health plan if we don't cover transgender surgery but on a cost basis alone I don't think we can afford it. Another member decried the cost of taking his son to the ER late at night and having to pay a four figure charge for the visit after the state health plan discount was applied. This problem is not a state health plan issue but just the effects of unavailable urgent care coverage at night. One member decried the limitation on pain med limitations-I reviewed the NC medical board's position paper on opioid prescribing and the BCBS coverage is entirely in keeping with current opioid prescribing practices-perhaps that member should be directed to a pain clinic to explore nonopioid options for chronic pain. Finally a member requested that the plan cover CPAP supplies more generously. I agree with her that we should look into that, perhaps at a board meeting if you think the board should make a decision. The other emails I think were handled fine by your excellent staff. See you Thursday! Pete Robie MD

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, et al., *Plaintiffs*, v. DALE FOLWELL, in his official capacity as State Treasurer of North Carolina, et al., *Defendants*.	Case No. 1:19-cv-00272-LCB-LPA

ORDER GRANTING PLAINTIFFS' MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. PETER ROBIE

This matter comes before the Court on the motion of Plaintiffs Maxwell Kadel; Jason Fleck; Connor Thonen-Fleck, by his next friends and parents, Jason Fleck and Alexis Thonen; Julia McKeown; Michael D. Bunting, Jr.; C.B., by his next friends and parents, Michael D. Bunting, Jr. and Shelley K. Bunting; and Dana Caraway ("Plaintiffs") to exclude the testimony of Dr. Peter Robie, a disclosed expert of Defendants Dale Folwell, Dee Jones, and the North Carolina State Health Plan for Teachers and State Employees.

Having considered Plaintiffs' Motion and Memorandum in Support, and for good cause shown, IT IS HEREBY ORDERED that Plaintiffs' Motion to Exclude Expert Testimony of Dr. Peter Robie is GRANTED.

This ____ day of _____ 2022.

The Honorable Loretta C. Biggs
United States District Judge