

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

MAXWELL KADEL, *et al.*,
Appellees,

v.

DALE FOLWELL, *et al.*,
Defendants.

No. 22-1721

**RESPONSE IN OPPOSITION
TO PARTICIPATION OF VARIOUS TRADE GROUPS AS *AMICI CURIAE***

Dale Folwell (in his official capacity as State Treasurer of North Carolina) and Dee Jones (in her official capacity as Executive Administrator of the State Health Plan) (collectively “*Appellants*”), hereby respond in opposition to the request of various trade associations to again offer their unsworn and untested claims and expert testimony outside of “materials in the record.” Doc. Nos. 48–49; *see* Fed. R. Civ. P. 56(c)(1). This Court should not repeat the error of the district court.

After the discovery period closed in the district court, these *amici* submitted a brief offering their own facts and opinions, which contradicted both Appellees’ expert medical witnesses and the materials developed by the parties through the extensive discovery process. JA95–105, JA466–479; JA532–543; JA3539–3562. Because these factual claims were raised after discovery closed, and because none of the *amici* were ever identified as either

fact or expert witnesses, *see* Fed. R. Civ. P. 26, Appellants lacked the opportunity to rebut, cross-examine, or even contest the *amici's* unsworn factual assertions and opinions through the adversarial process. As discussed in Appellants' opening brief, *see* Doc. No. 44 at 46–50, the district court then committed reversible error by granting summary judgment on the basis of the non/extra-record materials submitted by these non-party and unaccountable *Amici*. Fed. R. Civ. P. 56(c)(1).

This Court should not repeat that error. The factual record was built by the parties through months of discovery and adversarial testing. It would be improper to now allow these non-party trade associations to step in to replace the unfavorable dispositive evidence developed by the parties with the facts that these non-parties, and undoubtedly Appellees, wished had been shown through the adversarial discovery process in this case.

This Court is not an independent fact-finding body, and it should not repeat the district court's reversible error of supplementing the summary judgment record with untested inadmissible evidence on highly disputed factual issues.

Respectfully submitted this the 10th day of October, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2022, the foregoing was filed electronically with the Clerk of Court using the CM/ECF electronic filing system, which will send notification of such filing to all registered users.

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CERTIFICATE OF WORD COUNT

Pursuant to Fed. R. App. P. 27(d)(2), the undersigned certifies that the foregoing Response complies with this Court's word limit as calculated using the word count feature of the word processing software. Specifically, the Response contains less than 5,200 words, including the body of the Response and headings, but not including the caption, signature lines, this certificate, or the certificate of service.

This the 10th day of October, 2022.

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