

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
No. 3:22-cv-191

KANAUTICA ZAYRE-BROWN,

Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF  
ADULT CORRECTION, et al.,

Defendants.

**DEFENDANTS' MOTION FOR AN  
EXTENSION OF TIME TO RESPOND  
TO PLAINTIFF'S THREE MOTIONS  
TO EXCLUDE DEFENDANTS'  
EXPERTS**

Pursuant to Rule 6(b) of the Federal Rules of Civil Procedure and Local Rule 7.1, Defendants respectfully request that the Court enter an order extending the deadline for their Responses to Plaintiff's three motions to exclude Defendants' experts, up to and including December 11, 2023. In further support of this motion, Defendants state the following:

**Summary of Grounds for Relief**

1. On October 26, 2023, Plaintiff filed three separate motions seeking to exclude all three of Defendants' experts, in their entirety. (DE-70, 72-76)
2. Plaintiff filed these motions on the same day that the parties concluded extensive briefing on cross motions for summary judgment. (DE-60; DE-63; DE-64; DE-66; DE-68; DE-69)
3. Under Local Rule 7.1(e), responses to motions must be filed within fourteen (14) days. Thus, absent the relief requested herein, Defendants' responses to Plaintiff's motions to exclude their experts would be due on Thursday, November 9, 2023.
4. As more fully explained below, the preexisting professional obligations of the two undersigned counsel, along with a personal health matter which will require surgery and follow up

appointments, counsel for Defendants will be unable to comprehensively and appropriately respond to Plaintiff's motions, without the extension of time sought herein.

5. Therefore, Defendants respectfully request that this Court grant this motion for additional time, which is required to allow counsel for Defendants sufficient to attend to personal health matters, fulfill other professional obligations, and devote the time and attention necessary to fully respond to Plaintiff's effort to exclude all of Defendants' experts.

### **Brief Procedural Background**

6. On October 20, 2022, this Court entered a pretrial order and case management plan, which set forth several deadlines. (DE-28)

7. On January 6, 2023, the Court granted a joint motion to extend certain case management deadlines. (DE-36)

8. On February 17, 2023, after attempting unsuccessfully to obtain Plaintiff's consent, the undersigned counsel filed a motion seeking Rule 35 examinations and a supporting memorandum of law. (DE-37-38)

9. While that motion remained pending and with an impending expert report deadline of April 7, 2023, Defendants sought Plaintiff's consent of an extension of their expert report deadline and other case management deadlines that flowed from the submission of defense expert reports.

10. Plaintiff's counsel again withheld their consent. Thus, on March 13, 2023, the undersigned filed a motion seeking an extension of certain case management deadlines contingent on how the Court ruled on Defendants' motion for Rule 35 examinations. (DE-41)

11. Following full briefing on those motions, on March 16, 2023, this Court entered an order granting Defendants' motion for an extension of certain case management deadlines. (DE-44)

12. Therein, the Court ordered that Defendants' "Expert Report deadline is extended to: (1) thirty (30) days from the date of an Order allowing Defendants' Rule 35 Motion (Document No. 37); or (2) fourteen (14) days from the date of an Order denying Defendants' Rule 35 Motion (Document No. 37); or April 7, 2023, whichever is later. All other deadlines remain as previously ordered." (DE-44)

13. On May 12, 2023, the Court entered a joint motion of the parties to extend other case management deadlines. (DE-46)

14. The Court ordered that discovery was to be completed with 45 days of the submission of Defendants' expert reports; that the mediation report be submitted within 30 days of the completion of discovery; and that dispositive motions be filed with 45 days of the completion of discovery. (DE-46)

15. On June 7, 2023, the Court granted in part and denied in part Defendants' Rule 35 motion. DE-47.

16. In the Court's previous order (DE-44), it directed that Defendants' expert reports were due within 30 days of the Court entering an order which allowed Defendants Rule 35 motion. Since the Court entered an order allowing Defendant's Rule 35 motion on June 7, 2023, the deadline to submit Defendants' expert reports was set for July 7, 2023.

17. On July 7, 2023, in accordance with the Court's order, DE-44, Defendants served Plaintiff with copies of their three expert reports.

18. Also based on the Court's order (DE-46), the deadline to complete the outstanding discovery, namely depositions of experts, was set for August 21, 2023. Plaintiff completed depositions of all three of Defendants' experts by August 11, 2023.

19. And based on the Court's order (DE-46), the dispositive motion deadline was October 5, 2023.

20. Given that the trial date had not been moved since its initial setting and remained scheduled for the week of October 16, 2023, the parties jointly moved for a continuance of the trial to allow for sufficient time for the parties to fully brief their respective summary judgment motions. (DE-52)

21. On August 25, 2023, the Court entered an order continuing the trial in this matter to January 24, 2023. (DE-55)

22. October 5, 2023, each party filed motions for summary judgment, supporting memoranda of law, and appendices with exhibits. (DE-59-63)

23. On October 19, 2023, each party submitted a response in opposition to the other's motion for summary judgment, along with exhibits. (DE-64-66)

24. On October 26, 2023, each party submitted a reply in support of their own motions for summary judgment, along with exhibits. (DE-68-69)

#### **Plaintiff's Motions to Exclude all of Defendants' Experts**

25. Despite having all of Defendants' experts' reports in hand as of July 7, 2023, despite completing the depositions of all three defense experts by August 11, 2023, and despite having seven attorneys of record, Plaintiff waited until October 26, 2023, to file three separate motions, each seeking to exclude one of Defendants three experts. (DE-70, 72-60)

26. Through these motions, Plaintiff seeks to exclude *all* testimony and opinions of *all* three experts.

**The Undersigned Counsel Respectfully Request an Extension of the Deadline to Respond.**

27. These motions include extensive argument and assertions regarding the scope and nature of Defendants' experts' testimony and their opinions which warrant detailed and comprehensive responses. The current deadline of November 9, 2023, does not allow sufficient time for the undersigned counsel to prepare responses to these motions which the Court deserves. This is so for multiple reasons.

28. First, each of Plaintiff's motions contain various legal arguments and assertions regarding the opinions and testimony of the Defendants' expert that require thorough vetting, and which warrant a comprehensive response. Even setting aside other professional and personal obligations, the undersigned counsel would not have sufficient time and ability to provide thorough responses to these three motions in fourteen days.

29. Second, the undersigned counsel each have specific and significant professional obligations which will impact their ability to devote the time and attention necessary to provide this Court with the responses to these motions it deserves. These include, but are not limited to:

- a. Response to motion for preliminary injunction due on October 27, 2023, in *Cooper v. Berger*, (Case No. 23 CVS 28505) (Three-Judge Panel);
- b. Oral argument on October 31, 2023, in *Jones v. Solomon, et al.*, (Case No. 21-7239) (4th Cir.);
- c. Hearing on November 1 in *Cooper v. Berger*, (Case No. 23 CVS 28505) (Three-Judge Panel – Wake County);
- d. Appellate brief currently due November 7, 2023, on behalf of the State in criminal matter involving three counts of statutory rape, three counts of indecent liberties; and kidnapping (extension request pending) (*State v. Hernandez*, Case No. 23-832);

- e. Preliminary injunction filed and briefing schedule TBD in *Cooper v. Berger*, (Case No. 23 CVS 29308) (Three-Judge Panel appointment imminent); and
- f. Response Brief due on November 27, 2023, in *Ford v. Hooks et al.*, (Case No. 21-7647) (4th Cir.).

30. In addition to the above specific obligations, the undersigned counsel, Stephanie Brennan is the section head and supervising attorney of fourteen other attorneys and staff in the Special Litigation section at North Carolina Department of Justice. As such, she has significant supervisory responsibilities that require her time and attention.

31. Moreover, both undersigned counsel have devoted the past month or more briefing extensive motions for summary judgment and doing so on an expedited timeline with no extensions. Given that focus, both undersigned counsel have postponed addressing other matters that now require some time and attention.

32. Additionally, one of the undersigned counsel, Stephanie Brennan, is dealing with a medical issue that will require surgery during the two-week period currently set for briefing, and subsequent follow up care, that will rightfully divert some of her time and attention during the next several weeks.

33. Given these professional obligations and the personal medical issue, the undersigned counsel will require additional time to fully address and respond to the issues raised in Plaintiff's motions to exclude all of Defendants' expert witnesses.

34. On the morning of October 27, 2023, the undersigned counsel advised Plaintiff's counsel of their professional obligations and of Ms. Brennan's medical issue and the resulting need for additional time.

35. In response, counsel for Plaintiff stated that “Normally we’d consent to your motion as a matter of course[,]” but they would not consent to the motion citing concerns about timing. Thus, Plaintiff objects to this motion.

36. Plaintiff’s counsel objects to this motion on the grounds that it could delay the proceedings even though they possessed all the materials they needed to attempt to exclude Defendants’ experts for more than two months<sup>1</sup> and despite having seven attorneys of record.

37. Additionally, it is not clear that a ruling on these motions is as urgent as Plaintiff seems to suggest. Many of the issues raised by Plaintiff in these motions appear to be evidentiary matters (*e.g.*, relevance, credibility, and weight issues) which would more appropriately be addressed after a hearing and ruling on the parties’ summary judgment motions. *See Ray Communs., Inc. v. Clear Channel Communs., Inc.*, 673 F.3d 294, 305 (4th Cir. 2012) (“credibility determinations are not fodder for summary judgment proceedings.”). *See also Gray v. Spillman*, 925 F.2d 90, 95 (4th Cir. 1991) (on summary judgment it is not the court’s job to weigh the evidence[.]”)

38. Lastly, Defendants have made every effort throughout this case to avoid undue delays of this matter.

39. For example, Defendants did not seek extensions to respond to discovery requests served on them. Defendants produced all of their witnesses in a timely manner and efficiently pursued their own discovery. Defendants also agreed to handle cross motions for summary judgment without any extensions of time.

40. The only substantial delay in the case resulted from Defendants’ Rule 35 motion and Plaintiff’s objection thereto—a motion that was ultimately successful in part.

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<sup>1</sup> As noted, Plaintiff received all three defense experts’ reports on July 7, 2023, and completed their depositions as of August 11, 2023.

41. Defendants have adhered to professional courtesies by consenting to requests by Plaintiff (including at least two requests for extensions of time) and worked expeditiously to move this matter along—as they will continue to do.

42. However, given the breadth and importance of Plaintiff’s challenge to all three of Defendants’ experts, and the professional obligations and personal matters noted above, more time is required for the undersigned counsel to fairly and appropriately respond Plaintiff’s motions.

43. Expedited consideration of this motion is respectfully requested due to the short deadline presently in place.

WHEREFORE, Defendants respectfully request that the Court enter an order extending their deadline to respond to Plaintiff’s motion to exclude all three of their experts up to and including December 11, 2023.

This the 27th day of October 2023.

**JOSHUA H. STEIN**  
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