

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA**

KANAUTICA ZAYRE-BROWN,  
*Plaintiff,*

v.

THE NORTH CAROLINA  
DEPARTMENT OF ADULT  
CORRECTION, *et al.*,

*Defendants.*

No. 3:22-cv-00191-MOC-DCK

**REPLY BRIEF IN SUPPORT OF PLAINTIFF’S DAUBERT MOTIONS TO  
EXCLUDE THE TESTIMONY OF DRS. SARA E. BOYD, JOSEPH PENN,  
AND FAN LI**

Plaintiff submits this consolidated reply in support of her motions to exclude Defendants’ expert testimony (Docs. 70, 73, 75). Defendants’ responses (Docs. 86, 87, 88) are meritless. For several reasons, Defendants have not carried their burden of establishing the admissibility of their experts’ testimony.

First, Defendants do not claim that Drs. Boyd and Penn have ever done what they now claim to be experts in: evaluating a gender dysphoric patient’s need for gender-affirming surgery. Defendants argue that Boyd and Penn still qualify as experts because they have experience with *other* aspects of gender dysphoria and mental illness more broadly. But “an expert qualified in one field may be unqualified to testify in others,” even if the fields are closely related. *Kadel v. Folwell*, 620 F. Supp. 3d 339, 360 (M.D.N.C. 2022). And the issues in which Boyd and Penn may have expertise are not the issues before the Court.

Further, Dr. Boyd limited her opinion to whether Plaintiff needs surgery while “in a prison setting.” (Doc. 65-1, Boyd Rep. at 3.) But the Eighth Amendment does not allow Defendants to argue that a plaintiff could obtain better care outside of state custody. Defendants simply ignore this issue of law, thereby conceding the point. And in any event, Plaintiff is no longer in a prison setting because Defendants moved her to a community transition center.

Dr. Penn also is not qualified to critique the scientific research on the efficacy of gender-affirming surgery, and his cherry-picked literature review on that subject is unreliable. Indeed, he testified regarding the literature review: “This is, again, not my area of expertise.” (Doc. 75-1, Penn Dep. 223:7.) Defendants respond that Dr. Penn would only be “offering his general assessment of the literature and how it informs his clinical decision-making[.]” (Doc. 88 at 22.) But Dr. Penn’s clinical decision-making has not involved gender-affirming surgery, making his non-expert assessment all the less helpful to the trier of fact.

Then there is Dr. Li, the statistician. Courts assessing Eighth Amendment medical claims typically look to standards of care, clinical guidelines, the views of professional medical associations—things that clinicians consider when making treatment decisions. *See, e.g., De’lonta v. Johnson*, 708 F.3d 520, 523 (4th Cir. 2013). Dr. Li offers nothing of the sort. Instead, she critiques the statistical methodology underlying research on the efficacy of gender-affirming surgery. Defendants say this testimony is admissible to rebut Plaintiff’s expert, Dr. Ettner, who cites those studies. But Defendants, their other experts, and the Fourth Circuit agree that gender-

affirming surgery is effective and medically necessary for some patients. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595-96 (4th Cir. 2020). Dr. Li’s testimony—even if accurate—could not change that or whether Plaintiff is one of those patients. It therefore has no bearing on the core issue in this case.

For these reasons and as further detailed below, the Court should exclude all testimony from these experts.<sup>1</sup>

**I. The Court must hold Defendants to their burden of establishing the admissibility of their experts’ testimony.**

Before getting to their substantive arguments, Defendants make it sound remarkably easy to establish the admissibility of expert testimony. They say that “Rule 702 is broadly interpreted in favor of admission,” “exclusion [of an expert] is rare and disfavored,” and “the rules are even more relaxed for rebuttal expert opinions.” (Doc. 87 at 6-8 (capitalization omitted).)

That is a stretch. “While Rule 702 was intended to liberalize the introduction of relevant expert evidence, courts must recognize that due to the difficulty of evaluating their testimony, expert witnesses have the potential to be both powerful and quite misleading.” *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001) (quotation marks omitted). “The proponent of the testimony must establish its

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<sup>1</sup>Even if the Court denies this motion in whole or in part, it should still grant summary judgment on Plaintiff’s Eighth Amendment claim for injunctive relief. When reviewing all the evidence, a reasonable trier of fact—which on that claim would be the Court—could only find that Plaintiff has a serious medical condition; doctors selected by Defendants prescribed her surgery to treat that condition; and now Defendants are “intentionally interfering with the treatment once prescribed.” *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

admissibility by a preponderance of proof.” *Id.* Courts must “faithfully execute[]” their “critical gatekeeping role” to exclude evidence when the proponent does not carry its burden on any of Rule 702’s requirements. *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 279 (4th Cir. 2021). And as Defendants acknowledge, rebuttal experts must satisfy all these requirements as well. (Doc. 88 at 15.)

Defendants have failed to carry their burden of proof as to their experts’ qualifications, relevance, and reliability. Therefore, the Court must act as gatekeeper and exclude the proffered testimony.

**II. Defendants do not contend that Drs. Boyd or Penn have any experience evaluating a patient’s need for gender-affirming surgery.**

“[G]eneral knowledge, skill, experience, training, or education is insufficient to qualify an expert, and an expert qualified in one field may be unqualified to testify in others.” *Kadel*, 620 F. Supp. 3d at 360 (quoting *Cooper v. Laboratory Corp. of America Holdings, Inc.*, 150 F.3d 376, 380-81 (4th Cir. 1998)). An expert witness must have qualifications “concerning the particular issue before the court.” *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 392 (D. Md. 2001).

Here, Dr. Penn opines that “there was no clinical indication that the surgery was necessary to protect life, to prevent clinically significant illness or significant disability, or to alleviate severe pain[.]” (Doc. 65-13, Penn Rep. at 35.) Dr. Boyd opines that she made no “significant findings in [Plaintiff’s] mental state that would counsel in favor of the surgery as an immediate intervention, to be conducted in a prison setting, from a psychological standpoint.” (Doc. 65-1, Boyd Rep. at 34.) In support of

Dr. Penn, Defendants restate his credentials and conclude that Plaintiff “ignores Dr. Penn’s considerable experience dealing with the precise matters about which he opines[.]” (Doc. 88 at 19.) Defendants do the same for Dr. Boyd, asserting that, given her experience, she “is qualified to offer opinions . . . concerning Plaintiff’s mental health.” (Doc. 86 at 13-14.)

Glaringly, Defendants do not specify the experience that Penn or Boyd have with “the precise matters about which” they opine: whether a patient needs gender-affirming surgery to treat her gender dysphoria. They certainly have experience in *related* fields. But they do not claim to have dealt with the particular subject matter here. (Doc. 76 at 6-12 (reviewing Penn’s experience); Doc. 72 at 6-7 (reviewing Boyd’s experience).) That fact makes this case an easy call under Rule 702. *See Cooper*, 150 F.3d at 380 (“a general knowledge of chemistry” and experience with breath alcohol testing did not qualify witness to opine on the “particular scientific field” of urine alcohol testing).

Defendants try to distinguish *Kadel*, which excluded expert testimony concerning gender-affirming care. They argue that *Kadel* is different because it dealt with a “a categorical exclusion of a host of procedures from insurance coverage,” and does not “have any bearing on the issue of whether Dr. Boyd should be excluded.” (Doc. 86 at 18.)

Defendants miss the point. *Kadel* illustrates how a witness qualifying as an expert in one field might not qualify in another, even if the fields are closely related. In that case, a plastic surgeon could testify about gender-affirming surgery, but not

diagnosing gender dysphoria or the efficacy of clinical trials; an endocrinologist could testify about hormone therapy, but not the risks of surgery. 620 F. Supp. 3d at 364-65, 367-69. That is the dynamic here. Drs. Penn and Boyd may qualify as experts in some aspects of diagnosing or treating gender dysphoria, but they lack qualifications “concerning the particular issue before the court.” *Shreve*, 166 F. Supp. 2d at 392.

Defendants also try to distinguish *Cooper v. Laboratory Corp.* and *Smith v. Wyeth-Ayerst Laboratories Co.*, 278 F. Supp. 2d 684 (W.D.N.C. 2003). They assert—correctly—that those cases “support the notion that general expertise in a broader field, e.g., chemistry or medicine, does not necessarily translate to expertise in a more specific field such as toxicology or pharmacology.” (Doc. 86 at 19.) But then Defendants assert—incorrectly—that Dr. Boyd qualifies here because she “is offering opinions and conclusions on issues related to clinical and forensic psychology” generally, in which she has experience. (*Id.*)<sup>2</sup>

Under this view, a career in a vast field like psychology would make someone an expert in any number of related issues—even if they have little or no experience in them. Rule 702 is not so permissive. *See, e.g., Shreve*, 166 F. Supp. 2d at 392 (“[A]n expert who is a mechanical engineer is not necessarily qualified to testify as an expert on any issue within the vast field of mechanical engineering.”); *Bogosian v. Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472, 477 (1st Cir. 1997) (a “master mechanic” was not qualified to opine on specific issue of automotive design defect); *Lee v. Nat’l R.R. Passenger Corp.*, No. 3:10-CV-00392-CWR, 2012 WL 92363, at \*3 (S.D. Miss. Jan. 11,

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<sup>2</sup> Defendants do not make this argument for Dr. Penn. (*See* Doc. 88.)

2012) (social worker was not qualified in part because “*treating* someone for PTSD is an altogether different matter than *diagnosing* it”).

Accordingly, Drs. Boyd and Penn lack experience concerning the particular issue before the Court: evaluating a gender dysphoric patient’s need for gender-affirming surgery. Their testimony on that subject must therefore be excluded.

**III. Even if Dr. Boyd is qualified, her testimony is inadmissible.**

Assuming that Dr. Boyd qualifies as an expert, her testimony should still be excluded for the following reasons.

**A. Dr. Boyd’s opinion on obtaining surgery outside prison is irrelevant as a matter of law under the Eighth Amendment.**

Dr. Boyd agrees that gender-affirming surgery is necessary “to cure [Plaintiff’s] gender dysphoria,” but thinks that Plaintiff can wait until she is out of prison, where she could obtain better results. (Doc. 62-1, Boyd Dep. 166:21-167:21.) As Plaintiff has explained, this consideration is irrelevant under the Eighth Amendment—prison officials cannot defeat a claim by arguing that a prisoner could obtain better healthcare outside of prison. *See Mitchell v. Kallas*, 895 F.3d 492, 496 (7th Cir. 2018) (“Prison staff cannot bide their time and wait for an inmate’s sentence to expire before providing necessary treatments.”). This opinion must therefore be excluded.

In response, Defendants concede the point by not engaging with it at all. (*See* Doc. 86 at 20.) They only assert that Plaintiff’s current placement in a community transition center is like prison because she “is still constrained from certain activities, and subject to many of the same elements that, according to Dr. Boyd, are contributors to her distress.” (*Id.*) But Defendants cite no evidence of Plaintiff’s

current living conditions. And again, even if Plaintiff might get better treatment elsewhere, that does not make her ongoing medical need for that treatment any less legitimate. Therefore, this opinion must be excluded.

**B. Dr. Boyd's opinions on informed consent are irrelevant because they do not concern a contested issue.**

Dr. Boyd critiques Dr. Ettner's understanding of informed consent. That critique is irrelevant because no one disputes that Plaintiff can give, and did in fact give, informed consent to gender-affirming surgery. (Doc. 72 at 10.) In response, Defendants say that Dr. Boyd "is referring to a more comprehensive process" than "medical informed consent," and "Dr. Boyd makes these observations to support her opinion questioning the reliability of Dr. Ettner's bold assertion that [gender-affirming surgery] would cure Plaintiff's GD." (Doc. 86 at 21.)

First, it is remarkable that Defendants make this argument since Dr. Boyd *agrees* that gender-affirming surgery is necessary to cure Plaintiff's gender dysphoria. Defendants strain to argue otherwise, but conspicuously avoid Dr. Boyd's deposition transcript:

Q. Do you have any reason to think that Mrs. Zayre-Brown can be cured of her gender dysphoria while she still has a penis or a phallus as she calls it?

A. Based on her statements, I think not.

...

Q. Okay. You mentioned the -- the phrase necessary but not sufficient a little while ago. [] Would you say that removing her phallus and having genital surgery would be necessary but not necessarily sufficient to cure her gender dysphoria?

A. Ultimately, yes. The question of the timing, I think, is a separate issue, but in the long-term sense, yes.

(Doc. 62-1, Boyd Dep. 166:21-25, 167:12-21.)

Even putting that aside, Defendants cannot argue that surgery is unnecessary because, standing alone, it might not be curative. As the Fourth Circuit has explained, a prisoner requires treatment when her condition “is curable *or may be substantially alleviated*[.]” *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (emphasis added). And a single treatment does not have to be curative by itself to be medically or constitutionally necessary. Imagine a patient suffering from cancer. Would she be denied surgery because achieving remission *also* required chemotherapy and radiation? Of course not. Defendants’ argument is meritless and Dr. Boyd’s testimony is irrelevant. It should be excluded in its entirety.

**C. Dr. Boyd offers minimal support for her assertion that psychologists should not opine on medical necessity.**

Expert testimony is inadmissible when it relies on insufficient facts or ignores contrary facts. *See Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 478 (M.D.N.C. 2006) (doctor’s opinion was unreliable because of “failure to take into account the existence” of a widely accepted medical view). Dr. Boyd believes that psychologists like Dr. Ettner should not opine on medical necessity because Dr. Boyd knows several other psychologists who (she thinks) generally do not do that. (Doc. 65-1, Boyd Rep. at 5.; Doc. 70-1, Boyd Dep. at 89:11-90:20.) As Plaintiff has explained, that is an insufficient basis for such a sweeping opinion. Moreover, this opinion is unreliable because Dr. Boyd does not engage with the reality that psychologists like

Dr. Ettner regularly opine on medical necessity in clinical practice and litigation. (Doc. 72 at 11-14.)

Defendants respond, “Plaintiff ignores the case law that endorses flexibility in the reliability assessment, particularly when expert testimony is based on experience.” (Doc. 86 at 23.) Defendants further argue that Dr. Ettner’s similar testimony in other cases is irrelevant. (*Id.*)

Defendants cite no decisions admitting expert testimony based on the kind of minimal information that Dr. Boyd offers here. As for Dr. Ettner, Defendants again miss the point. Dr. Boyd may believe that psychologists should not make medical-necessity determinations. But for that opinion to be reliable under Rule 702, she must account for obvious, contradictory information—here, the fact that Dr. Ettner and other psychologists, guided by the WPATH Standards of Care, regularly make medical necessity determinations on gender-affirming care and believe that doing so is appropriate. *See, e.g., Edmo v. Corizon, Inc.*, 935 F.3d 757, 787 (9th Cir. 2019) (“Dr. Ettner [is] well-qualified to opine on the medical necessity of GCS.”); *Fields v. Smith*, 712 F. Supp. 2d 830, 838 (E.D. Wisc. 2010) (explaining that Dr. Ettner collaborates with physicians to “determine[] whether or not a particular treatment would be medically necessary”).

Because Dr. Boyd fails to even acknowledge this reality, her opinion should be excluded.

**IV. Even if Dr. Penn is qualified to opine on medical necessity, his testimony should still be excluded.**

Assuming that Dr. Penn qualifies as an expert on assessing the medical necessity of gender-affirming surgery, his testimony remains inadmissible for other reasons.

**A. Dr. Penn’s medical-necessity analysis is not reliable because he does not engage with the contrary opinions of Plaintiff’s treating clinicians.**

A methodology that ignores contrary, readily available information is inherently unreliable. *See Doe*, 440 F. Supp. 2d at 478 (doctor’s opinion was unreliable because of “failure to take into account the existence” of a widely accepted medical view); *Abarca v. Franklin Cnty. Water Dist.*, 761 F. Supp. 2d 1007, 1066 n.60 (E.D. Cal. 2011) (explaining that “a reliable expert would not ignore contrary data”). As discussed in Plaintiff’s opening brief, Dr. Penn does not engage with some of the most critical evidence in this case: the findings of Plaintiff’s treating clinicians, picked by Defendants, that she requires gender-affirming surgery. (Doc. 76 at 17-18.)

In response, Defendants say that “Dr. Penn’s methodology is both sound and equivalent to (if not more robust than) Dr. Ettner’s.” (Doc. 88 at 23.) But they do not even attempt to explain Dr. Penn’s failure to consider the contrary opinions of specialists in gender-affirming medicine who, unlike Dr. Penn, personally examined and treated Plaintiff. Accordingly, the opinion must be excluded.

**B. Dr. Penn is not qualified to critique medical research, and his cherry-picked literature review is not reliable.**

Dr. Penn endorses Defendants’ decision to refuse surgery because “there is a lack of high-quality scientific research indicating the long-term efficacy of gender-

affirming surgery as an effective treatment for gender dysphoria.” (Doc. 65-13, Penn Rep. at 35.) To reach this opinion, Dr. Penn conducted a literature review, reviewed Defendant Campbell’s literature review, and reviewed Dr. Li’s report. (*Id.* at 34.) Plaintiff moved to strike this opinion because Dr. Penn is not qualified to opine on the quality of scientific research. *See Kadel*, 620 F. Supp. 3d at 369 (doctor could not testify about “the efficacy of” medical research on gender-affirming surgery for lack of “experience, specialized training, or knowledge about crafting a research study, analyzing data, or conducting a clinical trial”).

In response, Defendants argue that “none of this precludes Dr. Penn from offering his general assessment of the literature and how it informs his clinical decision-making.” (Doc. 88 at 22.) Moreover, “Plaintiff cannot credibly argue that Dr. Penn, a medical doctor, lacks the qualification to opine as to his assessment of the general state of the medical literature and how it informs clinical judgment—especially since Dr. Ettner, who is not a medical doctor, nor an expert in study design or research methodology provides the same kind of opinions about the state of the literature.” (*Id.* at 23 (citation omitted).)

Not so. Dr. Ettner is an internationally recognized expert in gender-affirming care who has worked with thousands of patients, co-authored the medical text *Principles of Transgender Medicine and Surgery*, and had numerous federal courts qualify her as an expert—including cases where prisoners sought gender-affirming surgery. (Doc. 71-1, Ettner Reb. Rep. ¶ 4.) It makes perfect sense for Dr. Ettner to

opine on how research informs her clinical judgment. And Defendants have not challenged her expertise here.

Dr. Penn is altogether different. Defendants do not claim that he has ever made the kind of clinical decision at issue: whether a patient needs gender-affirming surgery. That makes his opinion irrelevant and unhelpful to the trier of fact. What should a judge or jury glean from a doctor—who claims no experience in conducting or evaluating research—testifying about how research affects his non-existent clinical practice?<sup>3</sup>

This opinion is also inadmissible because Dr. Penn’s methodology in conducting the literature review was unreliable. He took only a few hours, and as Defendants acknowledge, it “could have been better prepared and . . . [Dr. Penn] is not a research design or methods expert[.]” (Doc. 88 at 22.) Perhaps as a result, the review is underinclusive, discussing only two sources while ignoring the mountain of research contradicting his opinion. (See Doc. 76 at 14-16.) This kind of incomplete, cherry-picked report is inherently unreliable. See *In re Lipitor*, 174 F. Supp. 3d 911, 931 (D.S.C. 2016) (citing cases and holding that report created by “cherry-picking” articles to support conclusion was unreliable); *Tyree v. Bos. Sci. Corp.*, 54 F. Supp. 3d 501, 520 (S.D.W. Va. 2014) (same); *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233,

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<sup>3</sup>Relatedly, Dr. Penn’s report does not discuss how research “informs his clinical decision-making” for gender-affirming surgery, so he cannot offer that opinion at trial. Defendants were obligated to provide “a complete statement of all opinions the witness will express and the basis and reasons for them.” Fed. R. Civ. P. 26(a)(2)(B)(i).

1255 (11th Cir. 2005) (report was not reliable because “the medical literature does not support such opinions”).

Defendants respond that Dr. Penn properly relied on Dr. Li’s report and that experts may rely on others’ opinions “if of the type reasonably relied upon by experts in the particular field.” (Doc. 88 at 21-22 (cleaned up).) But as explained more below, Dr. Li’s report is not admissible either. Clinicians who treat gender dysphoria and other conditions do *not* rely on the kinds of non-medical opinions that Dr. Li offers—a study being “high quality” has little if any bearing on whether medical providers consider a treatment effective. Moreover, as the Fourth Circuit has recognized, gender-affirming surgery “is an accepted, effective, medically indicated treatment for” gender dysphoria. *De’lonta v. Johnson*, 708 F.3d 520, 523 (4th Cir. 2013). And as explained by Plaintiff’s expert Dr. Antommara, “clinicians must make decisions based on the best, currently available evidence . . . . They cannot tell their patients to come back later after randomized controlled trials have been conducted.” (Doc. 68-2, Antommara Reb. Rep. ¶ 18.)

Dr. Penn’s opinion on medical research—which he is not qualified to offer in the first place—cannot change any of this. It should be excluded.

**C. Dr. Penn’s opinion on the EMTO Policy is irrelevant because Plaintiff is not attacking that policy.**

Dr. Penn opines that Defendants’ EMTO Policy concerning transgender accommodations is reasonable. (Doc 65-13, Penn Rep. at 35.) Defendants argue that this opinion is relevant because Plaintiff has criticized aspects of that policy. (Doc. 88 at 5.) Plaintiff certainly believes that the EMTO Policy has its flaws, but she has not

brought a facial challenge against that policy. Indeed, it authorizes the surgery she requires. (Doc. 10-1 at 7.) Her claims instead focus on Defendants' *practices*: Defendants have applied the EMTO Policy in a way that is unlawful given Plaintiff's individual circumstances. Testimony on whether the EMTO Policy is good or bad on its face is irrelevant to Plaintiff's claims and could only serve to confuse the trier of fact.

**D. Dr. Penn's opinion on Dr. Ettner's articulation of medical necessity is irrelevant.**

Dr. Penn opines that the definition of medical necessity "advanced by Dr. Ettner focuses solely on a possible therapeutic benefit to be had by the intervention and is unworkable in the correctional context (and otherwise)." (Doc. 65-13, Penn Rep. at 35.) This opinion is irrelevant because Defendants have disavowed any argument that prison administration counsels against surgery; Defendants have misstated Dr. Ettner's report; and even under Dr. Penn's definition of medical necessity, Plaintiff clearly requires surgery. (Doc. 76 at 18-20.)

In response, Defendants ignore the "correctional context" piece. They only repeat Dr. Penn's false claim that, under Dr. Ettner's view, any cosmetic procedure that could make a patient feel better about themselves—like a mole removal or breast augmentation—becomes medically necessary. (Doc. 88 at 9.)

The Fourth Circuit disposed of this idea in *De'lonta*, explaining that gender-affirming surgery "is not considered experimental or cosmetic[.]" 708 F.3d at 523. Moreover, Dr. Ettner does not judge medical necessity by whether the patient will obtain just any benefit—her report cites the criteria used by the American Medical

Association. (Doc. 62-2, Ettner Rep. ¶¶ 99-100.) Dr. Ettner believes that Plaintiff needs gender-affirming surgery because, despite undergoing other treatments, Plaintiff still has persistent gender dysphoria, and surgery is the only remaining option that could cure or substantially ameliorate that condition. (*Id.* ¶¶ 133-36.) Courts examine these same factors when assessing Eighth Amendment claims. *See Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (treatment is required when patient has “serious disease or injury” that “is curable or may be substantially alleviated”); *De’lonta*, 708 F.3d at 523 (explaining that “surgery may be necessary for some individuals for whom serious [gender dysphoria] symptoms persist”).

Therefore, this opinion must be excluded as well.

**V. Dr. Li’s non-medical testimony is irrelevant, she is not qualified to opine on medical treatment, and her subjective analysis is unreliable.**

Dr. Li is not a health care provider of any kind and has little knowledge of gender dysphoria or its treatment. (*See* Doc. 74 at 9-11.) She opines that the studies cited by Dr. Ettner and WPATH are “low quality” and “simply do not provide reasonable support for the assertions made by Dr. Ettner and WPATH relative to the benefits in quality of life and well-being of gender-affirming treatments.” (Doc. 65-15, Li. Rep. at 25.)

This opinion is irrelevant because it has no bearing on real-life medical practice or Plaintiff’s individual health needs—the fundamental facts at issue. (Doc. 74 at 3-9.) Defendants respond that “Plaintiff overlooks the fact that her case relies extensively on the assertions of her expert and WPATH regarding the conclusiveness

of the scientific literature. Therefore, Dr. Li’s opinion, which is a direct rebuttal to those assertions, is most certainly relevant to a fundamental issue in this case.” (Doc. 87 at 14.) Moreover, “these opinions demonstrate that Dr. Ettner lacks reasonable support for her conclusion that the literature conclusively establishes the efficacy of [gender-affirming surgery].” (*Id.* at 15.)

The Fourth Circuit, however, and every single health care provider involved in this case—including *Defendants themselves*—agree that gender-affirming surgery can be effective and medically necessary for some patients. (*See* Doc. 60 at 7.) Defendants seem to suggest that a reasonable trier of fact could find surgery unnecessary for Plaintiff based on non-medical testimony that has nothing to do with her individual circumstances. That idea is far-fetched to say the least. And it is far more likely to sow confusion than help anyone understand the facts at issue.

Moreover, Defendants do not cite a single case in support. That is not surprising—in Eighth Amendment medical cases, courts typically examine standards of care, clinical guidelines, a patient’s medical history, the views of medical associations, and other things that clinicians care about when deciding how to treat patients. *See, e.g., De’lonta*, 708 F.3d at 523; *Edmo*, 935 F.3d at 795. So, even if Dr. Li is correct about studies being “low quality”—a term of art that does not mean “poor” or “inadequate”—it does not change how competent medical providers would treat Plaintiff’s gender dysphoria. (Doc. 68-2, Antommara Reb. Rep. ¶ 18; Doc. 71-1, Ettner Reb Rep. ¶ 19.)

Dr. Li is also not qualified to opine on what constitutes “reasonable support” for a specific medical treatment because she does not know what “reasonable support” is in that context. (Doc. 74 at 9-11.) Her methodology is unreliable for the same reason—she cannot reliably determine what constitutes reasonable support if she cannot define that term in the first place. The best standard Dr. Li offers is whether she herself thinks that evidence is adequate for purposes of academic publishing. (*Id.* at 11-13.)

In response, Defendants say that Dr. Li is not offering a medical opinion, and merely repeat her conclusion that “the cited studies were insufficient and did not provide reasonable support for the assertions made by Dr. Ettner and WPATH.” (Doc. 87 at 18). But “insufficient” for what purpose? Certainly not use in clinical decision-making. And again, what level of support is “reasonable?” Defendants do not say, and concede that Dr. Li “was not offering a specific standard for what would constitute ‘enough’ support[.]” (*Id.*) All told, Defendants simply cannot articulate what information the trier of fact could derive from Dr. Li’s testimony that would help answer the ultimate question in this case: whether Defendants have provided treatment that is “adequate to address the prisoner’s serious medical need.” *De’lonta*, 708 F.3d at 526.

Finally, Defendants say that “Dr. Ettner, just like Dr. Li, is not a physician, medical doctor, or the like. Thus, Plaintiff is yet again attacking Defendants’ experts while overlooking similarities in her own.” (Doc. 87 at 16.) It is Defendants, however, who yet again ignore that Dr. Ettner is a clinical health care provider who has worked

with thousands of patients and regularly makes medical necessity findings. (Doc. 71-1, Ettner Reb. Rep. ¶ 4.) She must make treatment decisions based on the best research available, which shows gender-affirming surgery to be effective. Dr. Li, on the other hand, has no such qualifications and does not have to make real-life treatment decisions for suffering patients. Her testimony should be excluded.

### CONCLUSION

Defendants' expert testimony should be excluded, and the Court should enter partial summary judgment for Plaintiff.

Alternatively, even if the Court denies this motion in whole or in part, it should still grant summary judgment on Plaintiff's Eighth Amendment claim for injunctive relief. A reasonable trier of fact—which would be the Court on that claim—could only find that Plaintiff has an objectively serious medical condition, and Defendants are “intentionally interfering with the treatment . . . prescribed” for that condition by their own doctors. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

Respectfully submitted, this 18<sup>th</sup> day of December 2023.

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## CERTIFICATE OF SERVICE

I certify that on December 18, 2023, I electronically filed the foregoing document using the ECF system which will send notification of such filing to all counsel of record.

/s/Daniel K. Siegel  
Daniel K. Siegel

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