

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

KANAUTICA ZAYRE-BROWN,

Plaintiff,

v.

NORTH CAROLINA DEPARTMENT
OF ADULT CORRECTION, et al.,

Defendants.

No. 3:22-CV-191

**PLAINTIFF'S BRIEF IN SUPPORT OF HER CONSENT MOTION TO
ALLOW EXPERT WITNESS TO APPEAR REMOTELY VIA
CONTEMPORANEOUS VIDEO CONFERENCE TECHNOLOGY**

Allowing Plaintiff's expert witness to appear remotely via contemporaneous video conference technology at the upcoming evidentiary hearing is warranted because Dr. Ettner's testimony will aid the Court in resolving the remaining factual issues and she cannot travel as she recovers from a recent medical emergency.

Procedural and Factual Background

On February 2, 2024, this Court issued an order denying the parties' motions for summary judgment without prejudice and set an evidentiary hearing for February 20, 2024, to address two questions:

1. Whether gender-affirming surgery is medically necessary for Ms. Zayre-Brown according to the WPATH Standards of Care.
2. Whether the ETMO policy, specifically the DTARC and Dr. Campbell's role therein, amounts to a de facto ban on gender-affirming surgery for GD patients.

(Doc. 92 at 14).

To answer the first of these questions, Plaintiff believes it is necessary to present the testimony of her expert witness, Dr. Randi C. Ettner. Dr. Ettner is a licensed clinical and forensic psychologist, one of the authors of versions 7 and 8 of the WPATH Standards of Care, and has expertise concerning the diagnosis, evaluation, and treatment of gender dysphoria. Dr. Ettner has diagnosed, evaluated, and treated between 2,500 and 3,000 individuals with gender dysphoria and mental health issues related to gender variance. Based on her expertise, her clinical interviews with Mrs. Zayre-Brown, and her review and assessment of Mrs. Zayre-Brown's medical records, Dr. Ettner is expected to testify that, in her expert opinion, gender-affirming surgery is medically necessary to treat Mrs. Zayre-Brown's gender dysphoria according to the WPATH Standards of Care.

On December 22, 2023, Dr. Ettner's retina detached from her eye, which required emergency eye surgery the following day. (*See* Ex. A, Declaration of Randi C. Ettner, Ph.D.). Her surgeon, Dr. Aaron B. Weinberg, performed a vitrectomy with insertion of a gas bubble which serves to hold the retina in its normal position until the detached retina heals and the bubble dissipates. (*Id.*) On January 22, 2024, Dr. Ettner visited Dr. Weinberg and learned that the gas bubble had not yet dissipated in her eye, and that, as a result, she cannot yet travel where such travel would require any change in elevation. (*Id.*) Experiencing a significant change in elevation prior to the dissipation of the bubble in her eye would risk causing the bubble to explode, resulting in a loss of Dr. Ettner's vision. (*Id.*) Dr. Weinberg does not expect the bubble

to fully dissipate before the February 20, 2024, hearing. Flying or driving from Chicago to Charlotte would involve dangerous changes in elevation. Accordingly, it is not possible for Dr. Ettner to travel to North Carolina before then without risking the loss of her vision. (*Id.*)

Argument

I. Granting the motion for remote testimony of Dr. Ettner is appropriate because good cause and appropriate safeguards exist.

Under Federal Rule of Civil Procedure 43(a), “the court may permit testimony in open court by contemporaneous transmission from a different location” when there is “good cause in compelling circumstances and . . . appropriate safeguards.” Remote testimony via videoconference may be allowed “at the district court’s discretion.” *Benjamin v. Sparks*, 986 F.3d 332, 344 (4th Cir. 2021).

There is good cause when a witness cannot testify in person for “unexpected reasons, such as accident or illness but remains able to testify from a different place.” Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment. This Court has permitted remote testimony of witnesses in prisoner civil rights suits. *See, e.g., McClary v. Butler*, No. 5:19-CV-00016-GCM, 2022 WL 187829, at *1 (W.D.N.C. Jan. 20, 2022); *McNeill v. Hinson*, No. 3:18-CV-00189-GCM, 2022 WL 138687, at *3 (W.D.N.C. Jan. 14, 2022). Other district courts likewise have found good cause in compelling circumstances when the witness suddenly faced an unexpected health condition and the witness’s testimony was important to the presentation of evidence. *See Gonzalez v. US Human Rights Network*, No. CV-20-00757-PHX-DWL, 2023 WL 5333261, at *1-2 (D. Ariz. Aug. 18, 2023) (allowing remote testimony where a

witness's doctor advised against traveling due to a worsening health condition, concluding "late-breaking medical condition" justified remote testimony); *Crowell v. Alford*, No. 22-cv-00416-REB-MDB, 2023 WL 8600092, at *2 (D. Colo. Oct. 3, 2023) (permitting remote testimony of a witness who had recently injured his knee and needed a knee replacement, where travel was impossible and witness's testimony was "material" to plaintiff's case); *Donahue v. U.S. Dep't of Homeland Sec.*, No. 16-cv-02443, 2021 WL 5764710 (D.D.C. Sept. 30, 2021) (similar); *Wilson v. United States*, No. 2:18-CV-1241 JCM (NJK), 2023 WL 2795866, at *2 (D. Nev. Apr. 5, 2023)(similar).

Here, Dr. Ettner recently underwent eye surgery to treat a detached retina. The severity of her ongoing eye condition and significant risk she faces from elevation makes it impossible for her to travel safely to North Carolina from her home in Chicago to testify in-person at the February 20, 2024 evidentiary hearing. And her testimony is undoubtedly material to this case. Accordingly, there is good cause to allow her to testify remotely.

When good cause has been found for remote testimony, appropriate safeguards must be in place in order for the court to permit such testimony. Fed. R. Civ. P. 43(a). Safeguards must "ensure accurate identification of the witness" and must also "protect against influence by persons present with the witness." Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment. "Accurate transmission" of the testimony must also be assured. *Id.* Measures must be taken to ensure that all parties have advance notice "of all foreseeable circumstances that may lead the

proponent to offer testimony by transmission.” *Id.* This Court has provided guidance on appropriate safeguards for remote witness testimony. *See McClary*, 2022 WL 187829, at *2; *Flores v. Alvarado*, No. 3:17-cv-514-RJC-DSC, 2018 WL 1697314 (W.D.N.C. Apr. 6, 2018). In *McClary*, this Court concluded appropriate safeguards were in place because the finder of fact would be able to assess the witnesses’ credibility by “observing facial expressions and body language” and “by listening to the timbre of the witness’ responses.” *McClary*, 2022 WL 187829, at *2. This Court also ordered the Clerk’s office to test the videoconferencing technology in advance of the trial to avoid possible technological issues. *Id.* In another case where remote testimony was permitted in an evidentiary hearing, this Court ordered the moving party to adopt specific safeguards. *Flores*, 2018 WL 1697314, at *2. The testifying witness, who resided in another country, was ordered to testify from a private room where he was “free from outside influence.” *Id.* The moving party was also responsible for ensuring the videoconference technology worked and was provided the option to work with courthouse staff before the evidentiary hearing to avoid potential technological issues. *Id.*

Here, the Court and Plaintiff’s counsel will be able to provide appropriate safeguards. Dr. Ettner can be driven to a site anywhere in Chicago for contemporaneous video conferencing. Additionally, counsel for Plaintiff is prepared to work with the clerk to test the videoconferencing technology in advance of trial to avoid technological issues. Videoconferencing technology would also ensure that the Court has the opportunity to assess Dr. Ettner’s credibility by being able to see and

hear her clearly.

Conclusion

The Court should allow Dr. Ettner to testify remotely via contemporaneous videoconference technology at the February 20, 2024 evidentiary hearing.

Respectfully submitted this the 8th day of February, 2024.

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CERTIFICATE OF SERVICE

I certify that on February 8, 2024, I electronically filed the foregoing document using the ECF system, which will send notification of such filing to all counsel of record.

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