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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

REV. PAUL A. EKNES-TUCKER, *
et al., *
Plaintiffs, * 2:22-cv-00184-LCB
vs. * July 12, 2022
* Montgomery, Alabama
* 9:30 a.m.
KAY IVEY, in her official *
capacity as Governor of the *
State of Alabama, et al., *
Defendant. *

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LILES C. BURKE
UNITED STATES DISTRICT JUDGE

Proceedings recorded by OFFICIAL COURT REPORTER, Qualified
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P R O C E E D I N G S

(In open court.)

THE COURT: Good morning, everyone.

Well, I think we can make this a quick hearing today, but I thought it wouldn't hurt for us just to all get together and talk through just a few things.

Why don't we start with the Rule 26 report and just kind of walk through that. I know that we have a couple of -- looks like maybe agreed-upon motions with some differences.

As soon as we get through this, we'll take that up, as well. I've got my staff printing those off. Somehow I left that on my desk in Huntsville.

Okay. So after reviewing this, everybody agrees on everything regarding where discovery is focused on each side.

On interrogatories, it looks like we have a difference.

So let me have one question here before we get started. I know the State has taken the position that plaintiffs are all to be treated as one plaintiff for the position of all that. That did seem to be the line when the plaintiffs all asked me to consolidate.

So has something changed that private plaintiffs would need -- that we would need a lot more discovery on the plaintiffs' side basically than what we would have on the defense side?

Who wants to address that?

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1 MR. CHEEK: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. CHEEK: Jason Cheek.

4 I would say that, no, nothing has changed. We would just
09:42:45 5 request that the United States be permitted to prove the equal
6 protection claim, as is necessary. So that's why we're asking
7 for a reduced number of interrogatories. But we also don't
8 want to do anything that adversely affects the private
9 plaintiffs' case since they have, I think, three or four
09:43:07 10 additional claims.

11 THE COURT: I'm just thinking out loud. Obviously,
12 you know, everybody's got the same number of claims that have
13 to be proven.

14 And so just -- and I'm just talking about right now
09:43:24 15 whether we are going to treat you guys as one entity or two
16 entities for the purpose of discovery. But it would seem to be
17 more fair and more in line with what we have talked about, if
18 however many interrogatories that we have, the combined
19 plaintiffs have the same amount that the defense has.

09:43:42 20 MR. CHEEK: Okay.

21 THE COURT: Does anybody have a serious objection to
22 that if we operate that way?

23 MS. VAGUE: No. I don't believe that we do, Your
24 Honor.

09:43:48 25 THE COURT: Okay.

1 MS. VAGUE: I will just echo what Mr. Cheek has said,
2 which is we do still believe that our positions are aligned,
3 and we plan to coordinate and avoid any sort of duplication.

4 In proposing these limits for discovery, our only
09:44:01 5 intention was just to make sure that there was room for the
6 United States to be able to prove their claims, as well,
7 without interfering with ours.

8 THE COURT: Right.

9 MS. VAGUE: That's what we were looking for there,
09:44:11 10 Your Honor.

11 THE COURT: All right.

12 All right. So now we're down to interrogatories. The
13 State says, you know, we need 30, and we'll give the other side
14 30. Y'all had said 20.

09:44:26 15 If I am going to treat you as one entity, would you rather
16 have 30?

17 MR. CHEEK: So, Your Honor, what has -- I can't speak
18 for the private plaintiffs, but the United States has requested
19 that it be allowed to serve 20 interrogatories.

09:44:40 20 If Your Honor would prefer to treat private plaintiffs and
21 the United States as a collective party, the United States
22 would be okay with 40 total interrogatories.

23 MS. VAGUE: Uh-huh.

24 MR. CHEEK: I don't know if the State has an objection
09:44:57 25 do that.

1 MR. DAVIS: We can live with that.

2 THE COURT: All right.

3 MR. DAVIS: I don't think anybody is going to ask
4 interrogatories that they don't need and try to be burdensome
09:45:03 5 on each other. And we are going to have to work together if we
6 bump up on problems.

7 MR. CHEEK: Agreed.

8 MS. VAGUE: We would be fine with that.

9 THE COURT: All right. Let's do 40 per side, then.
09:45:13 10 And, again, we will treat the private plaintiffs, just for
11 purposes of discovery, as one with the government.

12 Okay. Requests for Admission. Plaintiffs propose 40.
13 Defendants propose 25. Same thought process? 40 to a side?
14 Does anybody have an objection to that?

09:45:37 15 MR. CHEEK: Your Honor, the United States feels pretty
16 strongly about the number of RFAs, and the fact that they can
17 really streamline some things for trial and later.

18 And so what we had proposed was the United States have 40
19 RFAs. If we could go with no more than 60 for plaintiffs
09:45:59 20 total, are you okay with that?

21 MS. VAGUE: I'm fine with that.

22 MR. CHEEK: And 60 for the State. Are you okay with
23 that, Mr. Davis?

24 MR. DAVIS: I don't want to cause a problem, but
09:46:08 25 that's an awful lot.

1 MR. CHEEK: My -- I'm sorry.

2 MR. DAVIS: I'm more interested in the things be
3 balanced.

4 MR. CHEEK: So my intention is to not serve 60 RFAs.
09:46:24 5 I hope I don't need to do that many. But I also don't want to
6 find myself in a position where, you know, we're getting pretty
7 close and we really could have made a dent in narrowing issues
8 for the trial, and having to go back to ask --

9 THE COURT: So educate me a little bit. Where would
09:46:42 10 you be heading on these RFAs? Look, I may well give you all
11 you want, but that does seem like a lot. So educate me on why
12 we would need that many, and what would the subject of those be
13 specifically.

14 MR. CHEEK: Sure. So the Rule itself doesn't have a
09:46:56 15 limit. And as someone who was once served with 270 RFAs on the
16 eve of discovery closing, I learned my lesson the hard way on
17 that.

18 So where I think it can really be effective is
19 authentication of documents. Hopefully, we don't get into
09:47:13 20 those types of issues, you know, narrowing substantive issues
21 in the case, particularly because we are going to be doing, I
22 assume, a lot of medical expert testimony. You know, is gender
23 dysphoria a -- does the State -- does the defendant -- do the
24 defendants acknowledge that gender dysphoria is a legitimate
09:47:37 25 medical condition, for example.

1 And I'm totally speaking off the cuff here.

2 THE COURT: My recollection is that they did at the
3 last hearing. Am I correct?

4 MR. DAVIS: Right. We disagree about how to be
09:47:47 5 treated, but we don't disagree that it exists.

6 THE COURT: So one thing you mentioned was
7 authentication of documents. It seems to me that you ought to
8 be able to do that easily without RFAs, just by conferring?

9 MR. CHEEK: I certainly hope so, Your Honor.

09:48:02 10 And let me be very clear that the defense counsel have
11 been outstanding to work with. We've got a good relationship.
12 And I think private plaintiffs' counsel will agree with that.

13 I have also been burned in the past with counsel who have
14 not wanted to agree to authentication, which leads to a whole
09:48:23 15 host of issues as you're nearing trial. Do you need to
16 subpoena a custodian from Tennessee, for example, to come in
17 and testify. If so, there's a lot of legwork that goes into
18 those types of mechanics.

19 That's what I am trying to avoid.

09:48:37 20 THE COURT: Okay. All right. All right. Idea: 40
21 Requests for Admission per side, but, you know, either side may
22 seek -- either side can seek more for good cause shown.

23 All right. Depositions. I've got plaintiffs proposing
24 15, defendants 25. Plaintiff, since I am going to treat you as
09:49:21 25 one entity, does that change your opinion about the 15, or no?

1 MS. VAGUE: Your Honor, I think our position is still
2 that 15 -- and that's for fact witnesses, that's excluding
3 experts -- is still sufficient for our needs and for the
4 State's needs. We think that 25 for fact witnesses in a case
09:49:41 5 like this is excessive.

6 MR. DAVIS: Judge, we anticipate that under the
7 standard that the Court's preliminary injunction order held us
8 to -- applying strict scrutiny -- we have got a lot of work to
9 do.

09:49:54 10 We have -- it essentially shifted some of the burden to
11 us. And while we hope to persuade Your Honor that a different
12 standard should apply at trial, we want to build a record
13 because we think we can win under strict scrutiny, as well.
14 But that's going to mean third-party discovery involving some
09:50:11 15 clinics. UAB is not the only one giving these treatments.

16 It is going to mean some medical providers. It's going to
17 mean some patients.

18 The medical associations' views were given a lot of weight
19 at the preliminary injunction stage. We need to explore that.
09:50:24 20 Is there any basis for their view? How political are these
21 organizations?

22 So we think 25 may actually be a little scarce for the job
23 that we need to do to defend this law.

24 THE COURT: All right. Just because of the magnitude
09:50:41 25 of this case, I probably lean toward the high side rather than

1 the low side, so let's go with 25 per side on this.

2 All right. The length of depositions. Ms. Vague, is your
3 position affected by the fact I'm treating you as one entity?
4 Does that affect your position on that?

09:51:10 5 MS. VAGUE: Your Honor, I think that we still would
6 like to be granted a little bit of leeway on the length of
7 depositions, particularly if we're treated as one entity just
8 to ensure, as the State has pointed out -- there's some
9 extensive issues to go into here -- just to ensure that
09:51:27 10 everyone has time to ask the questions that they feel like they
11 need to prove their case.

12 THE COURT: Is there a witness or two in particular
13 that you think that you would need more than seven hours on?

14 MS. VAGUE: I'm not aware of one sitting here today.
09:51:40 15 And that's certainly something, as we put in our report, that
16 we would discuss with the State before going into that
17 deposition so that they're not caught off guard. And if they
18 view a problem with that, we could come back to the Court and
19 talk about that. But, hopefully, that's something we would be
09:51:54 20 able to negotiate ahead of time.

21 We don't anticipate walking into a deposition and not
22 giving the State any sort of heads-up that we anticipate this
23 one may be going a little over seven hours.

24 THE COURT: What's the State's thoughts on that?

09:52:07 25 MR. DAVIS: No matter how many plaintiffs there are,

1 we're always open to discussing things like that.

2 All I want for the State is for them to work together and
3 coordinate, and for this not to be more burdensome simply
4 because there are two parties over there instead of one. If
09:52:20 5 they're really one, then they ought to work together ahead of
6 time and sort out what needs to be asked.

7 MS. VAGUE: And I will just add briefly on top of
8 that. Of course, we will work together. We have no intention
9 of asking duplicative questions or going into the same topics.

09:52:36 10 We just want a little leeway to ensure that if the United
11 States has some additional areas of inquiries, that they're
12 given that leeway without cutting into our time to ask
13 questions.

14 MR. CHEEK: I was just going to say we are
09:52:45 15 committed -- the United States is committed to working with the
16 private plaintiffs to do this. And, in fact, I believe we
17 inserted language in the 26(f) that we submitted to the Court
18 stating that, that we'll coordinate discovery requests so we're
19 not issuing duplicative requests.

09:53:01 20 And we'll share discovery so that the State doesn't have
21 to undergo an additional burden because they are -- because
22 it's facing multiple parties.

23 THE COURT: All right. Let's do this. We'll go with
24 the seven hours for both sides. And I will let you guys decide
09:53:17 25 how you want to split your seven hours among yourselves.

1 That said, again, for good cause shown, if y'all need
2 another hour or two on a specific witness for a reason, then,
3 you know, file a motion, or talk to the State. I'm not going
4 to be stingy about that.

09:53:33 5 All right. Plaintiffs say this should last six days.
6 State says it should last two weeks. I guess my question to
7 both sides would be are both of you talking about the whole
8 trial, or just your side of the case?

9 MS. VAGUE: Your Honor, we're talking about the entire
09:54:03 10 trial. We believe it can be completed in six days.

11 We actually think it could be completed in less time, but
12 the six days we landed on was through negotiations with the
13 State, and understanding that they thought that their case
14 might last a little bit longer.

09:54:19 15 THE COURT: All right. And of that six days, how much
16 are you allocating to yourself?

17 MS. VAGUE: We would think two to three days, Your
18 Honor.

19 THE COURT: State?

09:54:41 20 MR. DAVIS: We think we'll probably need about a week
21 to put on our case, Judge. We're guessing. That's a long way
22 away.

23 THE COURT: Right.

24 MR. DAVIS: But looking at how things are going, how
09:54:51 25 the hearing went, how many witnesses we would have liked to

1 have called versus how many we did call, we think a week is a
2 reasonable estimate of how long the defense will need to put on
3 its case at trial.

4 THE COURT: Let's do this. I am going to hold
09:55:13 5 two weeks. I would think that probably would be on the high
6 side of what we would want to accomplish. But I bet that by
7 the time we get to next February or March, we'll have a lot
8 better idea of where that sits. So maybe we just revisit that.

9 And look, when we get to trial, I am going to give
09:55:35 10 everybody limits. And we are going to talk it through. We are
11 going to talk about who your witnesses are, how long you need,
12 all that sort of stuff.

13 But, you know, based on what your evidence is going to be,
14 we are going to set a time for each side, and we are going to
09:55:49 15 stick to it. It is going to be a fair time, and one that lets
16 everybody get their stuff in. But just have that in mind, as
17 well.

18 And I find that, you know, if I just leave things
19 open-ended, we start asking questions of witnesses that really
09:56:02 20 don't really bear on the facts.

21 All right. Let's talk about these protective orders.
22 Looks like maybe one is completely agreed on. One may not be.

23 Who wants to address that?

24 MR. DAVIS: I don't remember disagreements in this.

09:56:39 25 MS. VAGUE: Yeah. My understanding was we had reached

1 an agreement on both of those.

2 THE COURT: Okay. Then maybe I'm misstating. So both
3 of those are completely by agreement. All I need to do is
4 adopt the proposed order; is that right?

09:56:51 5 MS. VAGUE: I believe so.

6 MR. DAVIS: That's the State's understanding, Judge,
7 yes.

8 MS. VAGUE: Ours, as well.

9 THE COURT: All right. That makes that easy.

09:57:02 10 All right. Is there anything about the 26(f) report that
11 we needed to discuss that we haven't?

12 MR. DAVIS: I don't think so, Judge.

13 There are going to be issues that come up as we go along.
14 Based on the way things are going, I'm really confident that
09:57:21 15 we're going to be able to work out 99.9 percent of whatever
16 comes up, and hopefully bring very little of it to you.

17 THE COURT: Okay. All right.

18 All right. Do y'all have anything you wanted to add to
19 that?

09:57:34 20 MR. CHEEK: Nothing from the United States.

21 MS. VAGUE: Nothing, Your Honor.

22 THE COURT: While we're all here, is there anything
23 else we ought to talk about? Any issues you see that may
24 arise? Anything we can work through while we're all in the
09:57:45 25 room together?

1 MS. VAGUE: I don't believe so.

2 MR. DAVIS: None for us.

3 MR. CHEEK: None at this time, Your Honor.

4 THE COURT: Okay. Well, that's all good news.

09:57:51 5 All right. Thank you very much. And I will get all of
6 this entered. I will get an order out on -- well, let me ask
7 you this: Would you rather just amend your own 26(f) report to
8 talk about what we have said today? Or do you want me to do
9 it?

09:58:05 10 MS. VAGUE: Whichever your preference is, Your Honor.
11 We completely defer to you. We are happy to work together to
12 amend that, or have an order entered by you.

13 THE COURT: I love the idea of you amending it
14 yourselves. And that way you will be happy with the language.

09:58:16 15 MS. VAGUE: Understood.

16 MR. DAVIS: We'll take care of that.

17 THE COURT: Y'all have a great day.

18 MR. DAVIS: End of the week okay for this amended
19 report?

09:58:26 20 THE COURT: Oh, absolutely. I would say seven days if
21 you need it.

22 MS. VAGUE: Thank you.

23 MR. DAVIS: Thank you, Judge.

24 THE COURT: Absolutely. Thank you.

09:58:28 25 (Whereupon, the above proceedings were concluded at

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Christina K Decker

07-15-2022

Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

Date