

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

Case No. 215-2022-cv-00167

Steven Rand, et al.
Plaintiffs

v.

The State of New Hampshire
Defendant

SUPERIOR COURT
Clerk's Notice of Decision
Document Sent to Parties

on 09/12/2024

Denied



Honorable David W. Ruoff

September 12, 2024

Motion to Quash Plaintiffs' Subpoena to Lisa Witte

Grantham School District, by and through its counsel, Wadleigh, Starr & Peters, PLLC, hereby moves to quash Plaintiffs' subpoena to compel Lisa Witte's¹ testimony, stating as follows:

Introduction

1. This case involves Plaintiffs' challenges to the State's administration of the Statewide Education Property Tax ("SWEPT") and the sufficiency of State funding for public education. (*See generally* Am. Compl.)
2. Regarding the sufficiency of funding, Plaintiffs allege that both the base cost and differentiated aid per pupil are insufficient to fund adequate education in New Hampshire. (*See generally* Am. Compl.)
3. Based on testimony she gave during the *ConVal* trial, Plaintiffs wish to call Lisa Witte to testify at trial starting on September 30, 2024. To that end, Plaintiffs subpoenaed Ms. Witte. (*See* Ex. 1, Lisa Witte Subpoena.)

¹ Lisa Witte is now known as Lisa Walker. However, given that the subpoena was addressed to Lisa Witte, this motion will refer to her by her prior name to avoid confusion.

4. This Court should quash said subpoena because 1) compelling Ms. Witte to testify would unduly burden her; 2) any factual evidence that Plaintiffs intend to elicit from Ms. Witte may be obtained through other, less burdensome means; and 3) Plaintiffs may not elicit opinion testimony from Ms. Witte, absent extraordinary circumstances.

5. Alternatively, this Court should quash said subpoena because it was not properly served on Ms. Witte.

Background

6. Ms. Witte was the Monadnock Regional School District superintendent; she retired at the end of the 2023 school year.

7. The Monadnock School District is a plaintiff in *Contoocook Valley Sch. Dist., et al., v. State of New Hampshire, et al.*, 213-2019-CV-00069. In her role as superintendent, Ms. Witte testified at trial in that matter in the spring of 2023, providing factual and opinion evidence.

8. Since retiring, Ms. Witte has become a part-time emergency medical technician (“EMT”) for Peterborough, New Hampshire. Ms. Witte also serves as part-time superintendent for Grantham School District.²

9. As an EMT, Ms. Witte works two eight-hour shifts per week, from 8 AM to 4 PM. As a part-time superintendent, Ms. Witte works 24 hours per week.

10. Notably, Ms. Witte’s work schedule as an EMT is set a month in advance, and she is required to request time off before then. For example, the September 2024 schedule was set on August 1, 2024. Thus, if Ms. Witte wanted time off in September, she was required to so request before August 1.

11. Ms. Witte is scheduled to work as an EMT on September 30, 2024.

² The Grantham School District is also a plaintiff in *Contoocook Valley Sch. Dist., et al., v. State of New Hampshire, et al.*, 213-2019-CV-00069.

12. On or about August 6, 2024, Plaintiffs delivered the “Notice of Trial Subpoena” to Ms. Witte’s residence while she was elsewhere. Said subpoena requires that Ms. Witte testify starting on September 30, 2024, and “everyday thereafter until [her] testimony is completed[.]” (Lisa Witte Subpoena.) No payment of fees accompanied the subpoena.

Legal Standard

13. “[T]he court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” N.H. Super. Ct. R. 29(a).

14. “Any person may be summoned to attend and testify or give his deposition, by reading to him, or by giving to him in hand an attested copy of, the writ of summons, and by paying or tendering to him the fees established for his travel to and from the place where his attendance is required, and for one day’s attendance.” RSA 516:5.

15. However, “[t]he right to compel an expert to testify is not unlimited, but is subject to the traditional limitations excluding prejudicial, misleading, or cumulative evidence.” *Fenlon v. Thayer*, 127 N.H. 702, 707 (1986). Said right is also subject to the rules of evidence and fairness. *Id.* Ultimately, “[t]he trial court has broad discretion in ruling on the admissibility of evidence.” *Id.* at 706.

I. This court should quash Plaintiffs’ subpoena because compelling Ms. Witte to testify would unduly burden her.

16. Plaintiffs wish to call Ms. Witte because of her *ConVal* testimony about and on behalf of Monadnock School District, where she no longer works and about which she no longer has current information.

17. As above, Ms. Witte is an EMT and part-time superintendent. As an EMT, Ms. Witte’s work schedule is planned a month in advance, and she is scheduled to work on September 30, 2024. And requiring her to attend trial beginning on September 30th and to remain indefinitely available will disrupt her schedule, her employers’ schedules, and

the substantive work that Ms. Witte needs to accomplish in her role as a part-time superintendent for Grantham.

II. Plaintiffs cannot compel Ms. Witte to provide expert opinion testimony and can elicit any desired factual testimony via other, less burdensome means.

18. To the extent that Plaintiffs seek to elicit testimony as to certain school expenses, such information is publicly available. *See, e.g., Financial Reports*, N.H. Dep't of Educ., <https://www.education.nh.gov/who-we-are/division-of-educator-and-analytic-resources/bureau-of-education-statistics/financial-reports> (last visited Aug. 8, 2024). Any factual information about Monadnock School District not available from the State may be obtained from the district. There is no need to require a former district employee to take time off work indefinitely to attend trial and provide this information when it is easily available elsewhere.

19. Ms. Witte also provided opinion testimony in *ConVal*, but Plaintiffs are not entitled to compel expert testimony. Superior Courts in this state have generally found that a non-retained expert cannot be compelled to serve as an expert “free of charge and against her will.” Ex. 2, *Krakie v. Catholic Med. Ctr.*, No. 06-C-0717, at 4, (N.H. Super., Sept. 10, 2008) (O’Neill, J.); *see also* Ex. 3, *Burnham v. Exeter Hosp., Inc.*, 93-C-1203, at 3 (N.H. Super., Nov. 2, 1994) (Coffey, J.) (“Because none of the treating physicians has set himself or herself out *in this case* as an expert witness, the Court has no basis for forcing the physicians to act as such.” (emphasis added)).

20. Where any evidence that may permissibly be compelled from Ms. Witte is available via less burdensome means, the subpoena should be quashed.

III. Alternatively, this Court should quash Plaintiffs’ subpoena for improper service.

21. As above, persons “may be summoned to . . . testify . . . by *reading to him*, or by *giving to him in hand* an attested copy of, the writ of summons[.]” RSA 516:5 (emphasis added). Here, Plaintiffs delivered the subpoena to Ms. Witte by leaving it at her

residence. Thus, Plaintiffs failed to properly serve the subpoena because they did not 1) read the subpoena to Ms. Witte, or 2) give to Ms. Witte “in hand” an attested copy of the summons. Nor did they provide the required fees. *Id.* Improper service is an independent basis for quashing the subpoena.

WHEREFORE, Grantham School District prays that this Court:

- a. Quash Plaintiffs’ subpoena as to Ms. Witte; and
- b. Grant such further relief as is just and equitable.

Respectfully submitted,
Grantham School District

By its attorneys,
Wadleigh, Starr & Peters, PLLC

August 9, 2024

By: /s/ Elizabeth E. Ewing
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CERTIFICATION OF SERVICE

I hereby certify that a copy of this filing has this day been served via email on all parties via the Court’s electronic case filing system.

/s/ Elizabeth E. Ewing

Exhibit 1

STATE OF NEW HAMPSHIRE
Superior Court
Rockingham, ss.
Case No. 215-2022-CV-00167

Steven Rand, et al

Plaintiffs,

v.

The State of New Hampshire,

Defendant.

NOTICE OF TRIAL SUBPOENA

To: Lisa Witte
112 Old Street Rd
Peterborough, N.H. 03458

PLEASE TAKE NOTICE that, pursuant to New Hampshire Revised Statute § 516, you are hereby required to appear before the Rockingham County Superior Court, sitting at 10 Route 125, Brentwood, N.H. 03833, from the 30th day of September 2024, at 9:00 a.m., and everyday thereafter until your testimony is completed, to testify to what you know relating to the above-referenced action, then and there to be heard and tried between Steven Rand, *et al.* and the State of New Hampshire.

Hereof fail not, as you will answer your default under penalties prescribed by law.

Dated at Concord N.H., the 6th day of August, 2024.

Jillian Kalosky

JILLIAN KALOSKY
JUSTICE OF THE PEACE
State of New Hampshire
My Commission Expires
December 22, 2025

Justice of the Peace

My Commission Expires: 12/22/26

Dated: Concord, New Hampshire
August 5, 2024

Counsel for Plaintiffs

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* *admitted pro hac vice*

RETURN OF SERVICE

Left at about 6th day of August, 2024, at

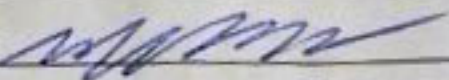
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Signature

Printed Name

Title (if applicable)

Agency (if applicable)



William Freyler

Investigator

Freyler Investigations LLC

The requesting party is responsible for payment of travel and attendance fees.

Exhibit 2

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Estate of Norman Thomas Krakie, by Tammy L. Krakie, Executrix

v.

Catholic Medical Center,
The New England Heart Institute of Catholic Medical Center, and
Cardiothoracic Surgical Associates, P.A.

No. 06-C-0717

ORDER

Hearing held (9/04/08) on the pending Motions to Compel in the above-referenced matter. Subsequent to review, the Court makes the following determination(s).

By way of background, the plaintiff, the Estate of Norman Krakie ("Kraie"), filed a medical negligence action (10/20/06) against defendants Catholic Medical Center ("CMC"), The New England Heart Institute of CMC, and Cardiothoracic Surgical Associates, P.A ("CSA"). Kraie received open heart surgery at CMC by Dr. Yvon Baribeau of CSA. During his post-operative recovery, Kraie experienced a number of medical complications. Kraie recovered enough to be discharged from CMC, but was readmitted after blood tests showed continuing problems. Kraie was placed on a heart telemetry monitor and treated by a number of physicians, including some from CSA and the New England Heart Institute. After being transferred to CMC's intensive care unit, Kraie suffered a cardiac arrest. He died three days later. Kraie's Estate

now brings this action, asserting medical negligence on the part of the defendants during their treatment of Krakie.

While deposing Nurse Practitioner Marilyn Daley ("Daley"), counsel for Krakie asked Daley to render an opinion on some medical information relating to a period when Daley was not responsible for Krakie's care. Daley refused. Krakie filed a Motion to Compel (11/27/07) Daley to answer the deposition questions. CMC, as Daley's employer, objected (12/07/07), arguing that Krakie could not force Daley to serve as an expert witness for Krakie. During Krakie's deposition of Nurse Practitioner Jayne Shumway ("Shumway"), counsel for Krakie asked Shumway for a curriculum vitae. Shumway responded that she did not have one. Krakie filed a Motion to Compel (6/09/08) CMC to produce a copy of CMC's credentialing file on Shumway, arguing that in the absence of a curriculum vitae from Shumway, Krakie requires the credentialing file to obtain information on Shumway's training and qualifications as a Nurse Practitioner. CMC objected (6/23/08), arguing that the credentialing file is protected from disclosure by RSA 151:13-a (2005). The Court will address each Motion in turn.

Motion to Compel Defendant Employee to Answer Deposition Questions

Krakie moves to compel Daley to render an opinion on and/or interpret several documents in Krakie's medical file. CMC objects, arguing that the charts in question do not relate to Daley's care of Krakie. CMC also asserts that Krakie's request would result in a compelled free expert opinion akin to involuntary servitude.

In support of their arguments, both parties cite persuasive authority. Krakie cites three cases from the New Hampshire Superior Court which granted motions to compel similar testimony. See Pl.'s Mo. at 16-18 (citing, Jenkins v. Hitchcock Clinic, Hillsborough North Superior Ct., No. 99-C-0269 (May 26, 2000) (Order, Barry, J.); Duarte v. St. Joseph Hospital, Hillsborough South Superior Ct., No. 98-C-0452 (Oct. 18, 1999) (Order on Plaintiffs' Motion to Compel, Brennan, J.); Reed v. Hitchcock Clinic, Inc., Hillsborough County Superior Ct., No. 89-C-0813 (Oct. 29, 1991) (Order on Plaintiff's Motion to Compel Deposition Answers, Sullivan, J.)). CMC relies on appellate cases from other jurisdictions which hold that experts cannot be compelled to render opinions absent a showing of necessity. See Def.'s Obj. at 13-19 (citing, e.g., Carney-Hayes v. Northwest Wisconsin Home Care, Inc., 699 N.W.2d 524 (2005)). In addition to a showing of necessity, the party seeking the compelled testimony must adequately compensate the expert for rendering the compelled opinion. CMC also cites Wheeler v. School Administrative Unit 21, where the Supreme Court (Thayer, J.) noted,

... Superior Court Rule 35.b ... states, in pertinent part, that a party may discover the opinions or facts of an expert not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

130 N.H. 666, 669 (1988). Although this case involves a witness who may be called at trial, CMC argues that this Court should apply the same "exceptional circumstances" standard to Krakie's Motion to Compel. CMC also cites one Superior Court case where the Court (Coffey, J.) found that a treating physician

could not be compelled to provide expert opinions unrelated to that physician's care of the patient. Def.'s Obj. at 19 (citing Burnham v. Exeter Hospital, Rockingham County Superior Ct., No. 94-C-0603 (Nov. 2, 1994) (Order on Plaintiffs' Motion to Compel).

There is a split of authority on this issue and our own Supreme Court has not yet rendered an opinion on it. The Court agrees with those courts that hold that, absent exceptional circumstances, it would be improper to permit a party to compel a witness to serve as an expert free of charge and against her will. See, e.g., Burnham, No. 94-C-0603 (Nov. 2, 1994) infra; Carney-Hayes, 699 N.W.2d 524. While Daley can be compelled to testify about her own involvement with and treatment of Krakie, it would be inappropriate to compel her to analyze medical records that do not relate to her care of Krakie and about which she has no independent knowledge. Requiring Daley to interpret these records would amount to a compulsion that she serve as an expert for Krakie, without compensation for her efforts. Krakie has not shown any exceptional circumstance which would warrant the requested compulsion. There is no reason why Krakie could not hire an independent expert to assess the records in question and render an opinion on what those records should have told the treating physicians. Such an independent, competent expert could establish the standard of care in relation to those records. In short, because a hired expert could effectively perform the same task Krakie seeks to compel Daley to perform, the Court finds that there is no exceptional circumstance that would warrant such

a compulsion, which would, in effect, require Daley to serve as an unpaid, unwilling expert witness.

Accordingly, Krakie's Motion to Compel Daley to answer deposition questions is DENIED.

Motion to Compel Production of Nurse Practitioner Shumway's Credentialing File

Krakie also moves to compel CMC to produce its credentialing file on Shumway. Krakie argues that this credentialing file is relevant because Shumway indicated during her deposition that she is a family Nurse Practitioner, but CMC permitted her to serve as a Cardiovascular Nurse Practitioner during Krakie's stay at CMC. Krakie argues CMC was negligent in permitting Shumway to serve in this capacity because Shumway may not have been qualified or properly trained for this position. Furthermore, Krakie argues that it requires the credentialing file because Shumway has stated that she does not have a curriculum vitae. CMC objects, arguing that RSA 151:13-a protects the credentialing file from discovery. RSA 151:13-a states that;

Records of a hospital committee organized to evaluate matters relating to the care and treatment of patients or to reduce morbidity and mortality and testimony by hospital trustees, medical staff, employees, or other committee attendees relating to activities of the quality assurance committee shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial or administrative proceeding.

In support of its position, CMC cites In re "K", wherein the Supreme Court interpreted the protections of RSA 151:13-a as applying to "any committee engaged in the process of quality assurance ... [which] is an essentially retrospective process based on the analysis of what has already been done."

132 N.H. 4, 12 (1989). CMC argues that its credentialing committee performs the kind of functions protected by the statute, and that a compelled production of its credentialing files would therefore violate the statute.

Krakie urges this Court to agree with two prior Superior Court cases which held that credentialing files were not protected by RSA 151:13-a. Pl.'s Mo. at 21-22 (citing Plumber v. Pilpil-Arambulo, M.D. and Optima Health – CMC, Rockingham County Superior Ct., No. 98-C-1010 (Sep. 17, 1999) (Order, Brennan, J.) (rejecting a similar argument by CMC); Gordon v. Day, M.D., MWV Healthcare Associates, Inc., and the Memorial Hospital, Carroll County Superior Ct., No. 00-C-0056 (Oct. 9, 2001) (Order, Nadeau, J.) (holding that an internal evaluation of an employee's background prior to hiring is not the kind of process protected by RSA 151:13-a)). The Plumber Court held that CMC's credentialing files were not protected by RSA 151:13-a because the credentialing committee did not "actively 'evaluate matters relating to the care and treatment of patients' in the sense of considering mistakes that may have happened in the past, or evaluating current policies with an aim towards changes for the benefit of the patients." (citing RSA 151:13-a). Citing the affidavit of Christine Senko ("Senko"), CMC argues that this Court should not follow the Plumber Court's determination because that Court did not have a full understanding of the variety of functions performed by CMC's credentialing committee. Senko, the director of Medical Support Staff Services for CMC, states that the credentialing file can include "references from other qualified practitioners," including current peers at CMC, attesting to the applicant's "competence." Senko Aff. at 5. The

credentialing file also includes appraisals from "the applicant's current peers, supervisors, section chiefs and department heads" about the applicant's "experience, clinical ability, judgment, character, and any other matter that might directly or indirectly affect patient care." Senko Aff. at 6.

The Court is persuaded that, based on the description of CMC's credentialing committee given in Plumber, that Court either did not fully understand the nature of the committee, or the committee has undergone changes since that order. Either way, this Court will make an independent assessment regarding whether the CMC credentialing files are privileged based on the committee's functions, including those not addressed in Plumber.

The Court finds that CMC's credentialing files fall within the privilege extended by RSA 151:13-a. Although Shumway's qualifications and experience are discoverable in some form, CMC's credentialing files contain much more than the typical curriculum vitae. The files contain information from staff peers regarding their competence in the workplace, which necessarily includes an evaluation of "matters relating to the care and treatment of patients." See RSA 151:13-a. Unlike the file at issue in Gordon, No. 00-C-0056 (Oct. 9, 2001) infra, the file at issue in this case contains more than an assessment of an applicant's work history as part of the hiring process: it also includes information regarding the employee's performance at CMC, including specific areas that may need improvement. Furthermore, the Court finds it highly relevant that medical staff must repeat the entire credentialing process every two years. See Def.'s Obj. at Appendix B, "Policy on Allied Health Professionals of CMC" § 5.2:a-b. This

procedure permits CMC to remove problem staff members by refusing to renew their privilege to practice. This is clearly a mechanism for "quality assurance." See RSA 151:13-a. In light of these considerations, the Court finds that CMC's credentialing files are covered by the RSA 151:13-a privilege. Although Krakie can obtain access to Shumway's qualifications through the discovery process, it may not do so via CMC's credentialing file.

Accordingly, Krakie's Motion to Compel production of CMC's credentialing file on Shumway is DENIED.

SO ORDERED.

Date 9/10/08

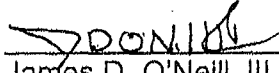

James D. O'Neill, III
Presiding Justice

Exhibit 3

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Stephen and Martha Burnham
as Guardians of James C. Burnham

v.

Exeter Hospital, Inc. and
David R. Heller, D.O.

93-C-1203

Stephen and Martha Burnham, Individually

v.

Exeter Hospital, Inc. and
David R. Heller, D.O.

94-C-656

Stephen and Martha Burnham
as guardians of James C. Burnham and
Stephen and Martha Burnham, Individually

v.

Mark Josephs, M.D.

94-C-603

ORDER ON PLAINTIFFS' MOTION TO COMPEL ANSWERS TO
QUESTIONS ASKED TREATING PHYSICIANS DURING DEPOSITIONS

Plaintiffs come before this Court requesting that the Court compel treating physicians of James C. Burnham to offer expert opinions as part of the discovery process. Plaintiffs argue that neither New Hampshire law nor any constitutional principle prohibits the Court from compelling the treating physicians to provide such information. In fact, plaintiffs rely on New Hampshire case law to support their argument that compulsion is appropriate in this case. Defendants, on the other

hand, argue that only under exceptional circumstances may expert testimony be compelled, and that only where a person has been retained as an expert may his or her opinion testimony be compelled. The situation before this Court, defendants argue, falls into neither of these categories.

Both parties place great emphasis on Fenlon v. Thayer, 127 N.H. 702 (1986), as supporting their respective positions:

Plaintiffs argue that Fenlon supports a general rule that a party may assert the "right of testimonial compulsion" of experts.

Plaintiff's Motion, p. 4, no. 11. Defendants argue just the opposite. Defendants posit that the court's compulsion of expert testimony in Fenlon is distinguishable in several significant respects from the case before this Court, and that those differences are dispositive.

The differences between Fenlon and the case at bar to which defendants point for support of their position are as follows. First, Fenlon involved an expert that had been retained and paid as an expert witness by a party to the case, whereas here none of the treating physicians has agreed to act as an expert witness. 127 N.H. at 704. Second, Fenlon involved the compulsion of expert testimony at trial rather than during discovery. Id. Defendant argues that these distinctions were determinative of the court's ruling in Fenlon and thus must be considered by this Court in making its decision.

The Court agrees that the differences between Fenlon and this case support denial of plaintiffs' motion. In Fenlon, all

that the Court found that the expert physician was required to do was to testify as to opinions he had been hired and paid to form, albeit in favor of the party other than that by whom he had been retained. The facts before this Court are far different in that none of the treating physicians involved in this case has agreed at any time to act as an expert witness for either party. Because none of the treating physicians has set himself or herself out in this case as an expert witness, the Court has no basis for forcing the physicians to act as such.

The difference between the timing of the motion to compel in this case and Fenlon is also significant to this Court. In Fenlon, the Court compelled the expert witness to testify at trial because at that late date the court's failure to compel testimony would have rendered a grave injustice in light of the plaintiff's lack of access to other potential experts. Here, on the other hand, plaintiffs' rights will in no way be impaired by the denial of their motion. Plaintiffs have adequate time to procure, in anticipation of litigation, experts of their own.

The Fenlon court distinguished between the compulsion of trial testimony and the pretrial discovery of facts and opinions of experts. 127 N.H. 706. The latter falls within Superior Court Rule 35.b, which provides in pertinent part that a party may discover the opinions or facts of a person retained as an expert but not expected to be called as a witness at trial "only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or

opinions on the same subject by other means." Wheeler v. School Admin. Unit 21, 130 N.H. 666, 669 (1988), quoting Rule 35. This standard is not satisfied in the case before the Court. First, the rule applies only to those who have agreed to act as experts. In this case, the persons who are the subject of the motion to compel are not "experts" as understood by the Court. Second, the circumstances of this case are not "exceptional" as described within the Rule because there are ample alternatives open to the plaintiffs to obtain other persons as expert witnesses. Thus, the Rule which provides for compulsion of expert opinion at the discovery stage does not dictate compulsion in this case.

Finally, plaintiffs argue that the New Hampshire Rule of Evidence on expert testimony, Rule 702, supports compelling the treating physicians' testimony. The Court disagrees, however. The Court reads the language of Rule 702 as allowing for expert testimony, but in no way sanctioning the compulsion of that testimony.


For these reasons, the Court finds that compulsion of expert testimony by the treating physicians would be inappropriate under the circumstances of this case.

Accordingly, plaintiffs' motion is DENIED.

So ordered.

Date

11-2-94


Patricia C. Coffey, Presiding Justice