IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division

WILLIAM THORPE, *et al.*, Plaintiffs, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*, Defendants.	)	Case No. 2:20-cv-00007-JPJ-PMS

DEFENDANTS' REPLY IN SUPPORT OF MOTION, AND MEMORANDUM IN SUPPORT OF MOTION, TO EXCLUDE THE REPORT AND TESTIMONY OF PLAINTIFFS' PROPOSED EXPERT MICHAEL L. HENDRICKS

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Plaintiffs' partial opposition to Defendants' motion to exclude the Report and testimony of Michael Hendricks focuses primarily on his experience and certification as an expert in other matters. But as Plaintiffs' note, Defendants don't question Hendricks' general qualifications. Instead, Defendants seek to exclude Hendricks' Report and testimony because he used unreliable methods to reach pre-determined conclusions. Because Plaintiffs' cannot explain away the weaknesses in Hendricks' methodology in ***this case***, the Court should grant Defendants' motions, bar Hendricks' testimony, and strike his Report.

I. Hendricks Failed to Conduct Differential Diagnoses to Reach His Causation Conclusions.

Plaintiffs do not dispute that Hendricks needed to conduct a differential diagnosis to render reliable causation conclusions. Instead, Plaintiffs' argue the Court should allow Hendricks' opinions because he "considered other possible causes of Plaintiffs' mental health issues in forming his opinions." Plaintiffs' Opposition to Defendants' Motion to Exclude the Report and Testimony of Plaintiffs' Proposed Expert Michael L. Hendricks ("Pls' Opp.") (ECF No. 393) at 10. But Plaintiffs' argument conflates uncritically reciting Plaintiffs' mental health and trauma histories with meaningfully analyzing whether those experiences caused the mental health conditions Hendricks claims they experienced in the Step-Down Program. As outlined in Defendants' opening brief, an acceptable differential diagnosis requires a process of ***eliminating*** other potential causes of the relevant condition – not simply listing alternative causes without critical analysis. Hendricks' Report failed to offer any analysis suggesting he engaged in the requisite process of elimination in reaching his causation determinations.

Case law supports rejecting expert testimony that acknowledges, but does not grapple with, potential alternative causes of a plaintiff's harm. For example, in *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir. 2001), the Court excluded expert testimony regarding the cause of

nonunion in a spinal fusion surgery. The scientific literature and opposing expert in the case indicated that smoking could cause non-union. *Id.* at 202. But rather than address this potential alternative cause in a meaningful fashion, the excluded expert acknowledged the plaintiff's smoking and then dismissed it out of hand as a potential alternative cause for his injury. *Id.* at 202-203. As the Court explained: a "differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation." *Id.* at 202 (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999)). Thus, the Court concluded, "if an expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding the expert's testimony." *Id.* The failure to "identify specifically how he ruled out smoking and other potential causes of the nonunion" led the Court to exclude the opinion as improperly speculative. *Id*. at 203.

Similarly, in *Perkins v. U.S.*, 626 F. Supp. 2d 587, 595 (E.D. Va. 2009), the plaintiff claimed to suffer injuries in an automobile accident. One of plaintiff's experts argued the accident caused plaintiff's knee, neck, back and hip problems. *Id.* at 590. But the plaintiff also suffered from pre-existing osteoarthritis and obesity. *Id.* at 594. The expert acknowledged awareness of both pre-existing conditions in his deposition and their potential to cause similar symptoms, but did not meaningfully address them in his letter-report or explain how he determined the accident, rather than the other factors, caused the injury. As the Court explained, the expert's opinion appeared "driven by willful blindness to plausible, perhaps even probable alternative explanations for [the plaintiff's] symptoms and injuries." *Id.* at 594. The Court considered this a "fatal analytical gap" and excluded his opinion. *Id*. at 594-595.

Hendricks committed the same analytical errors here. He provides details on the plaintiffs' childhoods, criminal histories and pre-Step Down Program mental health histories, but uniformly fails to explain why he ruled out those traumas as the cause of the mental health conditions he observed through his psychological testing and interviews. For example, Hendricks wrote that "Mukuria has sustained short-term memory problems that persist to the present day and that are attributable to his experience in solitary." Report of Michael L. Hendricks ("Hendricks Rep.") (ECF 368-1) ¶ 77. But he never explains why he ruled out Mukuria's 2006 motor vehicle accident as a potential cause of his memory loss, despite Mukuria's self-professed concern that he "has not fully recovered" from the accident. Hendricks Rep. ¶ 73. Similarly, Hendricks outlined Wall's pre-existing psychological history and significant family history of mental illness, including his mother's "mental breakdown" and diagnosis of paranoid schizophrenia and manic-depression. Hendricks Rep. ¶¶ 93, 97. Wall reported that "virtually everyone in his family has some form of mental illness." Hendricks Rep. ¶¶ 94. Of course, none of those family members suffered mental illness because of the Step-Down Program. Yet Hendricks never engages in any process of elimination to rule out genetics as the cause of Wall's mental health issues or explains how he determined the Step-Down Program, rather than Wall's family history and pre-existing conditions, caused the trauma-based symptoms and depression that Hendricks attributed to the Step-Down Program. Hendricks Rep. ¶ 100.

Defendants cited several other examples of Hendricks' failure to rule out alternative causes of mental health conditions in their opening brief, and will not recite them all again here. *See* Defendants' Motion, and Memorandum in Support of Motion, to Exclude the Report and Testimony of Plaintiffs' Proposed Expert Michael L. Hendricks ("Def. Br.") (ECF No. 368) at 7-9. Plaintiffs' correctly note that Hendricks' Report does not "ignore" Plaintiffs' prior personal and

mental health histories, insofar as the Report merely recites them. But the Report ***does*** ignore the practice of differential diagnosis. As a result, it fails to satisfy *Daubert*'s standard for reliability because it does not explain any basis for ruling out these complicated histories as the cause of the mental health conditions observed in Hendricks' testing and interviews. Since Hendricks took the same short-cuts with all named Plaintiffs to reach his pre-determined conclusion that "solitary confinement" caused their mental health problems, his failures should result in exclusion of his Report and testimony in full.

II. Hendricks Speculated Based on Limited Information; He Did Not Make "Reasonable Inferences" Based on All Available Evidence.

Plaintiffs further defend Hendricks' Report by claiming his logical leaps qualify as "reasonable inferences" rather than speculation. But Hendricks was not forced to speculate – or even infer – because of "lack of any evidence," as Plaintiffs claim. Pls' Opp. at 12. Instead, Hendricks ***chose*** to review only a limited universe of factual information. Hendricks admitted that he did not review Plaintiffs' complete medical histories or consider third-party information through interviews with family members, previous treating physicians, or others with information about his subjects. *See* Defs. Br. at 14-15, Hendricks Dep. (ECF No. 368-2) at 108:5-18; 109:20-111:16. He admitted he did not review institutional mental health records from Texas or Wyoming for the two named Plaintiffs housed there. Hendricks Dep. at 118:5-119:5. As such, Hendricks willfully considered less information than he could have, and then used the absence of additional facts to speculate as to causation. While Hendricks need not reach conclusions with "absolute certainty," *see* Pls' Opp. at 12, his conclusions must at least consider all available evidence. Hendricks admitted that he chose not to do that here, which renders his "inferences" about causation unreliable speculation. *Russell v. Wright*, No. 3:11-CV-00075, 2013 WL 596062, at *3

(W.D. Va. Feb. 15, 2013) (limiting expert's opinion to documents he actually reviewed and excluding overall opinion that failed to consider other evidence).

III. Plaintiffs Failed to Provide Factual or Legal Support for Substituting Hendricks' Opinion for That of Two Other Experts.

At minimum, the Court should exclude Hendricks' opinions about McNabb and Thorpe. Plaintiffs argue that Hendricks could not examine McNabb and Thorpe because of their transfer out-of-state after commencement of the litigation. Pls' Opp. at 6. But Plaintiffs fail to explain why they then substituted Hendricks' opinion for that of the clinical psychologists they hired to examine and issue reports about those named Plaintiffs. Plaintiffs concede that the American Psychology Association's best practices suggest conducting personal interviews and evaluations with subjects. *Id*. at 7. Yet, they opted to ignore the opinions of the two experts they hired to examine McNabb and Thorpe in favor of their preferred opinion from Hendricks, even though he did not interview or evaluate them.

The cases cited by Plaintiffs do not support admissibility of Hendricks' Report about subjects he did not examine. In *Wilhelm v. Ameristep Corp.*, No. 7:15-CV-00362, 2018 WL 6272911 (W.D. Va. Nov. 30, 2018), the Court allowed expert testimony that relied wholly on a different expert's report for one major, distinguishable reason – the expert who made the relevant observations died before trial. The dead expert was "the only expert…who had the opportunity to observe and record" the testing at issue. *Id.* at * 6. Not so here. Plaintiffs could have designated Drs. Cabeldue and Smith – the clinical psychologists who interviewed and evaluated Thorpe and McNabb, respectively – as experts based on their personal knowledge of the relevant facts relating

to those two named Plaintiffs. But Plaintiffs clearly did not like their opinions,[1] so instead chose to use Hendricks, whose selective conclusions better support their claims.

Plaintiffs also cite *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771 (7th Cir. 2017), for *dicta* regarding reliance on testimony from other experts. But in that case, the Court excluded the expert report at issue. *Id*. at 789. Specifically, the Seventh Circuit found the excluded expert could not rely on testimony of a counterpart whose report was not sufficiently reliable for admissibility on its own. *Id*. Here, Plaintiffs did not even bother to try to offer Cabeldue and Smith as experts to establish the reliability of their findings.

Finally, Plaintiffs claim Hendricks' disagreements with Cabeldue and Smith lend credence to his conclusions, because they show he viewed their reports through a critical lens. Pls' Opp. at 9. But Plaintiffs' arguments are inconsistent with the evidence. Plaintiffs claim Hendricks concluded Thorpe suffered from PTSD because he relied on "institutional mental health records" that Cabeldue did not review. *Id*. But Cabledue testified she reviewed those exact same institutional records. Def. Br.at 5, n.1; Cabledue Dep. 39:6-40:5 (ECF No. 368-3). Thus, Hendricks' claim that his diagnosis differed from Cabeldue because she didn't "have enough information to diagnose PTSD," lacks factual support. Instead, he used the same information to reach a different conclusion, despite never interviewing Thorpe. The Court should not accept Hendricks' conclusions, drawn from less reliable methods, in the face of contrasting opinions from the doctors Hendricks hand-picked to conduct the evaluations of Thorpe and McNabb.

[1] Cabeldue and Smith's conclusions did not support Plaintiffs' claims that the Step-Down Program caused significant mental health issues for Thorpe or McNabb. Def. Br. at 5-6.

IV. Plaintiffs Concede Medical Opinions Contained In Hendricks' Report Are Not Admissible.

Plaintiffs admit Hendricks is not a medical expert and claim he did not offer any opinions on non-psychological medical issues. Pls' Opp. at 13-14. Given that concession, the Court should strike and exclude the following portions of Hendricks' report, which improperly opine that the Step-Down Program caused certain medical conditions, and bar any testimony from Hendricks that suggests physical health effects of the Step-Down Program:

- Report[2] ¶ 54 – Hendricks claims it would "seem entirely plausible" that Plaintiff Cornelison suffered heart problems because of solitary confinement. He also suggested solitary confinement caused digestive problems.

- Report ¶ 60 – Hendricks discusses Plaintiff Hammer's alleged "physical symptoms from his time in solitary confinement, including shortness of breath, headaches, migraines and restlessness."

- Report ¶ 96 – Hendricks suggests Plaintiff Wall suffered heart palpitations, high blood pressure, dizziness and migraines because of solitary confinement.

- Report ¶ 113 – Hendricks suggests Plaintiff Thorpe developed hypertension and glaucoma from incarceration.

- Report ¶ 116 – Hendricks concludes Plaintiff Thorpe's cardiac symptoms could be side effects of solitary confinement.

- Report ¶ 152b – Hendricks finds "Extended periods of isolation lead to adverse mental health, and sometimes physical health, consequences in previously healthy individuals." The statement about physical health should be excluded.

- Report ¶ 152c – Hendricks finds "As a result of protracted isolation, each Plaintiff…has developed serious psychological and/or physical distress and impairment in functioning." The statement about physical distress and impairment should be excluded. Because the overall finding in ¶152c – that "each Plaintiff" suffered relevant symptoms – relies on Hendricks' use of "and/or" and the inappropriate physical health evaluation, the Court should strike the entire paragraph.

- Report ¶152d – Hendricks finds individuals may respond to high levels of stress with "cardiac vulnerability (e.g., hypertension)" or "immune vulnerability (e.g., autoimmune disorders." Both findings merit exclusion.

[2] Hendricks' Report is attached as Exhibit 1 to Def. Br. (ECF No. 368-1).

- Report ¶153 – Hendricks opines that "the conditions of confinement in which the Plaintiffs were house while in the Step-Down program is seriously damaging to their mental and physical health in the following ways." The statement about physical health should be excluded.

CONCLUSION

Plaintiffs' opposition failed to establish Hendricks' Report met *Daubert*'s hallmarks of reliability. Hendricks' participation in prior prison condition litigation demonstrates his experience, but also explains why Plaintiffs were so eager to include him – and no other clinical psychologists – as their chosen expert: they knew what his Report would say before he wrote it. Credentials and experience do not insulate experts from the requirement to follow reliable methods for each matter they handle. Because Hendricks cut corners in this case, the Court should exclude his Report in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

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