

COPY

ANGIE SPARKS
CLERK DISTRICT COURT

2017 DEC 12 PM 4: 29

FILED
BY YISA KALLIO
DEPUTY

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

RONALD ALLEN SMITH and
WILLIAM GOLLEHON,

Plaintiffs,

v.

STATE OF MONTANA,
DEPARTMENT OF CORRECTIONS,
INTERIM DIRECTOR LORAINÉ
WODNIK, WARDEN LEROY
KIRKEGARD, and JOHN DOES 1-20,

Defendants.

Cause No. DDV-2008-303

**ORDER ON
MOTIONS FOR SANCTIONS
AND FOR PROTECTIVE ORDER**

The Court has before it two related motions. These motions grow out of the response or alleged lack of response by Defendants State of Montana *et al.* (State) to the December 12, 2016, Order of this Court on Plaintiffs Ronald Allen Smith and William Gollehon's motion for discovery.

Plaintiffs have moved pursuant to M.R.Civ.P. 37 for the imposition of sanctions against the State for failing to comply with the December 12, 2016 Order and for misrepresenting that the State's expert witness Dr. Roswell Evans' did not use student researchers in preparing his testimony in the case at bar.

The State has moved for a protective order and an *in camera* inspection with regards to the materials mentioned in Judge Cooney's Order.

Each party opposes the other party's motion.

Ronald R. Waterman, Gregory A. Jackson, Michael Donahoe, and Jim Taylor represented Plaintiffs on the briefing. C. Mark Fowler and Robert Stutz represented the State on the briefing. Neither party requested oral argument. The parties have each submitted notices of submittal pursuant to Local Rule 5F. The motions are ready for decision.

Having considered the file herein and the briefs of the parties, the Court concludes that Plaintiffs' motion for sanctions should be granted and the State's motions for a protective order and for *in camera* inspection should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

As indicated by its cause number, this case has been pending for nine years. For seven of those years, the Honorable Jeffrey Sherlock was the presiding judge, including being the presiding judge at the trial herein. Upon Judge Sherlock's retirement at the end of 2015, the Honorable DeeAnn Cooney assumed jurisdiction. Judge Cooney issued the December 12, 2016 Order underlying the present motions. Upon his election to the bench effective January 2017, the Honorable Michael F. McMahon assumed jurisdiction. Upon Judge McMahon's substitution, the undersigned assumed jurisdiction on January 20, 2017.

In summary, this case involves Plaintiffs' challenge to the protocol utilized by the State in enforcing its death penalty. Plaintiffs are currently sentenced to the death penalty. They challenged whether pentobarbital, the drug used by the State to effectuate lethal injections, met the legislatively required classification of being an "ultra-fast acting barbiturate."

On October 25, 2015, following a bench trial, Judge Sherlock entered his findings of fact, conclusions of law and order, in which he concluded that pentobarbital is not an ultra-fast acting barbiturate as required by the statute, and therefore ordered the State to select a different barbiturate to accomplish lethal injections or modify its statute requiring an ultra-fast acting barbiturate.

In the bench trial, the Court heard from only two witnesses: Dr. Mark Heath on behalf of the Plaintiffs and Dr. R. Lee Evans on behalf of the State. Dr. Heath testified with a reasonable degree of medical certainty that pentobarbital is not an ultra-fast acting barbiturate. Dr. Evans testified that pentobarbital could be considered short-acting as opposed to ultra-short acting but that there was no meaningful difference between pentobarbital and thiopental, a drug classified by Dr. Evans as ultra-short acting.

Judge Sherlock noted, however, that prior to this trial, Dr. Evans had never testified that pentobarbital was ultra-fast acting, although he did so at this trial. The Court struck Dr. Evans' testimony because it did not comport with his prior discovery responses or declarations filed with the Court. Judge Sherlock also noted that Dr. Evans had previously testified in a Florida case, *Pardo v. Palmer*, that the onset of pentobarbital was three to four minutes, while at this trial he testified that the onset of pentobarbital was under one minute. Judge Sherlock noted the "stark contrast" between Dr. Evans' prior testimony and current trial testimony.

Based on his review of the testimony of Drs. Heath and Evans, Judge Sherlock found that pentobarbital was not an ultra-fast acting barbiturate as required by state law and enjoined the State from using that drug in its lethal injection protocol unless and until the statute authorizing lethal injection was modified.

Following the issuance of the Court's Order, Plaintiffs moved for the award of attorney fees on October 20, 2015, pursuant to the private attorney general doctrine and under the declaratory judgment act. While this motion was pending, Plaintiffs on March 9, 2016,¹ filed a motion to preserve evidence and for discovery. Plaintiffs filed this motion in support of their motion for attorney fees and sought the State and Dr. Evans to "preserve, retain and produce all communications" between them. Plaintiffs also sought to have Dr. Evans "preserve, retain and produce all communications" between himself and the student researchers he used in developing his testimony both in the present case and in a Tennessee case, *West v. Schofield*, where he had testified to the efficacy of pentobarbital. Lastly, Plaintiffs sought to have the Montana Attorney General "preserve, retain and produce the results of any internal investigation" it had conducted about this matter. Plaintiffs assert that but for Dr. Evans' inconsistent testimony, this case could and should have been resolved on summary judgment, without Plaintiffs having to incur the additional costs and fees associated with going to trial. Plaintiffs assert that by doing so, the State vexatiously multiplied the proceedings in violation of § 37-61-421, MCA.

The State opposed Plaintiffs' motion, arguing that it was improper to allow discovery after trial, that Dr. Evans' testimony and disclosures had not been inconsistent, and that Plaintiffs had not explored these issues when they had a chance during their pretrial deposition of Dr. Evans. The State also argued that the communications between the State and Dr. Evans and between Dr. Evans and his student researchers² were protected work product.

In reply, Plaintiffs note that upon their request, the Attorney General had undertaken an investigation into Dr. Evans' testimony and the State's attorneys'

¹ By this time, Judge Sherlock had retired, and Judge Cooney had assumed jurisdiction of this matter.

² The State argues also that Dr. Evans did not use student researchers in the present case.

involvement in any changes in that testimony. The Attorney General completed the investigation³ and provided Plaintiffs with a letter noting the investigation was complete, that appropriate actions were taken against the State's attorneys, without specifying what the attorneys did or what actions the Attorney General had taken, and that the State had terminated its dealings with Dr. Evans.

Judge Cooney conducted oral argument on Plaintiffs' motion and issued her Order on Motion to Preserve Evidence and for Discovery on December 12, 2016:

This Court agrees that Dr. Evans' testimony in *West v. Schofield* raises serious questions about whether he changed his testimony to reflect what the Defendants wanted him to say as opposed to what he believed to be true. Information about this issue is relevant as to whether any actions of the Defendants unreasonably and veraciously [*sic*: vexatiously] multiplied the proceedings and therefore is relevant to the issue of attorney fees.

... If in fact Defendants caused Evans to change his opinion to something he did not believe in order to bring this case to trial, the Defendants could be liable for attorney fees pursuant to Mont. Code Ann. § 37-61-421.

Order on Motion to Preserve Evidence and Motion for Discovery, pages 4-5.

From this analysis, Judge Cooney issued her Order granting Plaintiffs' motion:

The Montana Attorney General and his deputies **shall** preserve, retain, and **produce** all communications, written, electronic, or otherwise, between the Montana Attorney General's office and Dr. Evans that relates to the changes made between Dr. Evans' original declaration dated March 10, 2015, and his supplemental declaration dated April 8, 2015. This limitation ensures Defendants only have to disclose mental impressions that are directly at issue in this case. Additionally, Dr. Evans

³ The report of this investigation is among the materials sought by Plaintiffs.

shall preserve, retain, and **produce** any communications between himself and the student researchers he sued for which he ultimately based his testimony. Finally, the Montana Attorney General **shall** preserve, retain and **produce** the results of any internal investigation about this matter.

Id., at page 5 (citations omitted; emphasis added).

ANALYSIS

To discuss the decisions of Judges Sherlock and Cooney answers the issues presented by the parties in their present motions. Judge Sherlock found enough inconsistencies in Dr. Evans' statements between his pretrial declarations, his testimony in other trials and his trial testimony in this case that he ordered portions of his trial testimony stricken. Judge Cooney's analysis is that what Plaintiffs sought in their motion to preserve and produce evidence was clearly relevant to Plaintiffs' motion for attorney fees and ordered the materials sought by Plaintiffs to be preserved and produced.

There is no leeway for this Court, the undersigned now presiding, to reach a different conclusion or engage in an extended further analysis. Judge Cooney's Order does not call for any further *in camera* review or for any protective order. In truth, the State did not even argue for such a review or protective order before Judge Cooney. Nor does this Court see the need for such review or protective order. Some of the arguments that the State makes in support of its motions or in opposition to Plaintiffs' motion are not supported by the record or by previous orders of the Court. There can be no doubt, for example, that Dr. Evans' position did "evolve" significantly between his first and second declarations, his testimony in other cases, and his testimony at the trial in this matter. Judge Sherlock so found, and Judge Cooney confirmed. There can be no doubt that Dr. Evans utilized student researchers in preparing his testimony. There can be no doubt that

the Attorney General took these facts seriously enough to mount its own investigation at the request of Plaintiffs and then to take some action toward the attorneys in this case and in terminating its relationship with Dr. Evans. All of these matters, as found by Judge Cooney, go to the issue of whether the State has improperly or vexatiously multiplied this litigation.

To be clear, the Court is not reaching a conclusion on whether Plaintiffs are ultimately entitled to attorney fees as sought in their earlier motion. The Court is only concluding and affirming what Judge Cooney decided: the State shall produce, without further delay, those materials identified in Judge Cooney's December 12, 2016 Order.

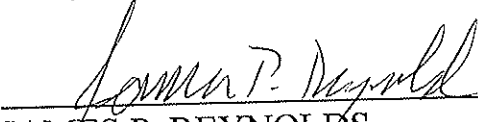
For the foregoing reasons, the Court is further deciding that the State's position in opposition to Plaintiffs' motion is not well-founded. As a sanction for the State's failure to comply with Judge Cooney's Order, the State should pay Plaintiffs' attorneys' fees incurred in their efforts to obtain information about Dr. Evans' testimony.

IT IS ORDERED that the State's motions for *in camera* examination and for a protective order are **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' motion for sanctions is **GRANTED**. The State shall immediately produce without further delay to Plaintiffs those materials identified in Judge Cooney's December 12, 2016 Order.

IT IS FURTHER ORDERED that the State shall pay Plaintiffs' attorney fees incurred in connection with obtaining discovery concerning Dr. Evans' testimony as set forth in Judge Cooney's Order and herein.

DATED this 12 day of December, 2017.



JAMES P. REYNOLDS
District Court Judge

C: Ronald F. Waterman, Esq., 310 East Broadway, Helena, MT 59601
Gregory A. Jackson, Esq., 320 11th Avenue, Helena, MT 59601
Michael Donahoe, Esq., 50 West 14th Street, Suite 300, Helena, MT 59601
Jim Taylor, Esq., PO Box 9138, Missoula, MT 59807-9138
C. Mark Fowler/Jonathan M. Krauss/Robert Stutz/Kirsten Madsen, Assistant
Attorneys General, PO Box 201401, Helena, MT 59620-1401

JPR/a/DDV-2008-303_Smith et al v State et al_Order on Motions for Sanctions and for Protective Order.doc