

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

LESTER DOBBY, et al., plaintiffs,

v.

WILLIAM WEILDING, et al., defendants.

Case No. 13-cv-1068

Judge Robert M. Dow

OPPOSITION TO PLAINTIFFS' AMENDED MOTION FOR RULE 706 EXPERT

Despite having no pending legal claim related to COVID-19, plaintiffs are seeking some version of a special master, monitor, or court-appointed expert to become involved in how the State and the Department of Corrections are addressing the COVID-19 public health emergency at Stateville prison in Joliet. The State is aggressively responding to that crisis with help from a long list of public health experts. Additional input from plaintiffs' preferred experts is not necessary or appropriate.

On April 2, 2020, plaintiffs moved for a "special master"—with "expertise in correctional facility management as well as infectious disease and/or public health"—to "monitor," "assess," and "evaluate" the Department's response to COVID-19 at Stateville, and even be "charged with" (1) segregating prisoners; (2) making sanitation and health recommendations, (3) instituting social distancing, (4) providing PPE to class members, and (5) segregating other class members based on their age or medical condition. Dkt. 232 at 3–4, 20–21, 34.

After an April 3 call with the Court, plaintiffs amended their motion to seek a court-appointed expert under Fed. R. Evid. 706. Dkt. 239. They want this expert to (a) access information from IDOC, (b) provide recommendations to the Court and the parties, and (c) provide "monitoring" and "advice" to the Court and the parties on prisoner (1) housing; (2) access to PPE; (3) access to cleaning supplies, laundry services, and showers; (4) social distancing; and (5) communications with counsel, family, and friends. Dkt. 239 at 5–7.

Plaintiffs propose Dr. Michael Stern *and* Mr. Eldon Vail, or, if defendants agree, Dr. Michael Puisis, currently a consultant to Dr. John Raba, the monitor in *Lippert v. Baldwin*, 10-cv-4603. Defendants oppose plaintiffs' amended motion on the following grounds:

1. **Plaintiffs' have no pending legal claim that justifies their request.** *Dobby* is a deliberate indifference case based on conditions at Stateville specifically related to (1) birds and vermin; (2) lighting; (3) unsanitary cells, showers, food carts, and ceilings; (4) ventilation; (5) heating; (6) water supplies; (7) *Dobby's* personal health; and (8) unstable housing facilities. Plaintiffs' case precedes and therefore makes no allegations related to COVID-19. In light of the State's aggressive actions to combat COVID-19 generally, and at Stateville in particular (discussed below), plaintiffs have no valid basis to sue, second-guess, or interfere with state officials over their handling of the COVID crisis.

2. **Plaintiffs' proposed experts are not needed to help a trier-of-fact determine a fact in issue.** Rules 706 and 702(a) allow a court to appoint an expert when "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." *Elcock v. Davidson*, 561 F. App'x 519, 524 (7th Cir. 2014). Here there is no fact "in issue" related to COVID-19. Also, the Seventh Circuit has upheld refusals to appoint Rule

706 experts in deliberate indifference cases where the issues were “not so complicated,” did not involve “probing, complex questions concerning medical diagnosis and judgment,” and “were not beyond a lay person’s grasp.” *Ledford v. Sullivan*, 105 F.3d 354, 359-60 (7th Cir. 1997); *accord Dobbey v. Carter*, 734 F. App’x 362, 365 (7th Cir. 2018) (upholding denial of prisoner’s request for an appointed medical expert where the issues were “comprehensible to a layperson”). Plaintiffs’ topics for expert help are comprehensible, and in any event, plaintiffs’ proposed experts do not offer any specialized expertise in dealing with COVID-19 or the particular conditions at Stateville.

3. **Rule 706 should not be used to help plaintiffs prosecute their case.** Even a cursory review of their CVs shows that plaintiffs’ requested experts have long histories of consulting for plaintiffs in prisoner cases. Vail is plaintiffs’ expert in the pending *Davis* segregation case (and was hired by counsel with an appearance in *Money*). Stern was plaintiffs’ retained expert in *Lippert* (and also hired by counsel appearing in *Money*). Court orders in *Lippert* restrict Puisis from testifying in other cases, Dkt. 244 & 593, and the consent decree, Dkt. 1238, requires him to protect confidential information. Those orders should preclude him from being a court-appointed expert here, where he likely would be called to testify. Plaintiffs’ requested appointment would be “tantamount to the Court assisting the plaintiff in proving his case against the defendants. Rule 706 was not designed to provide such relief to a litigant.” *Tangwall v. Robb*, No. 01-10008-BC, 2003 WL 23142190, at *3 (E.D. Mich. Dec. 23, 2003); *see also Griffin v. Perry*, No. 04 CV 654 MCA/WDS, 2008 WL 8097279, * 2 (D.N.M. Mar. 10, 2004) (unreported decision) (rejecting appointment on this ground). Plaintiffs’ request is improper because it would allow them to use the guise of a court-appointed expert to obtain information to support an unasserted claim.

4. **The Department is already addressing COVID-19 at Stateville with substantial expert help.** Plaintiffs’ motion is based on a false and unsupported premise that IDOC is not doing enough to combat COVID-19 at Stateville, where four Stateville prisoners have died and eleven are hospitalized related to COVID-19. This is belied by the following:

- Creation of a Stateville Incident Command Center, headed by IDOC Deputy Director Marcus Hardy as Incident Commander. The Command Center coordinates Stateville’s COVID-19 response with officials from the Illinois Department of Public Health, the Illinois National Guard, and the State’s healthcare vendor. The command structure includes Stateville’s designated Medical Liaison (Kelley Lawshea), as well as section chiefs in charge of Operations, Logistics, and Planning, each with specific responsibilities related to COVID-19.
- The National Guard has installed a 32-bed mobile unit on Stateville grounds to provide recovery space for Stateville prisoners.
- Installation of special tents for donning/doffing PPE
- Stateville-specific Pandemic Response Plan consistent with CDC guidance
- Contract with Carle Hospital for testing Stateville and NRC prisoners and staff
- Enhanced separation of infirmed prisoners
- New shower schedules to maintain distancing

- Cell houses cleaned and sanitized by staff on every shift; additional cleaning supplies provided to prisoners

These Stateville-specific actions are in addition to other system-wide actions, including those described in *Money*.

IDOC officials receive daily guidance from a range of experts including Evonda Thomas-Smith, IDPH Executive Director; Dr. Avery Hart from the Cook County Department of Corrections and a consultant to IDPH; Dr. John Jay Shannon, expert consultant to IDPH; Dr. Craig Conover, IDPH Chief Medical Officer; and Dr. Mahesh Patel and Dr. Scott Borgetti, infectious disease specialists at UIC and expert consultants to IDPH.

In addition, the *Lippert* consent decree (governing IDOC medical care) contains specific provisions related to infection control, including the appointment of a Communicable and Infectious Diseases Coordinator (Tanya Hedges) who is focused on COVID-19 issues. The *Lippert* monitoring team has advised that based on CDC guidance, its members will not presently visit Stateville, but Dr. Raba is nevertheless actively advising IDOC on its response to COVID-19, including by requesting (a) IDOC's COVID-related reports to IDPH and the Governor's Special Task Force, (b) IDOC's plans for addressing COVID at each IDOC facility, and (c) permission to interview personnel about treatment and prevention measures. IDOC has continued to confer regularly with the *Lippert* monitors throughout the COVID-19 crisis.

These actions are overseen by the Governor's Office, which has established a special task force dedicated to managing the State's response to COVID-19.

For these reasons, plaintiffs' amended motion for a Rule 706 expert should be denied. If the Court decides to appoint an expert, we request leave to submit information about an alternative choice, and to comment on payment and procedural safeguards.

Dated: April 8, 2020

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Respectfully Submitted,

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