IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

WILLIAM CAPACCHIONE, Individually and on Behalf of CRISTINA CAPACCHIONE, a Minor,

Plaintiff,

v.

CHARLOTTE-MECKLENBURG SCHOOLS et al.,

Defendants.

Case No. 3:97-CV-482-P

JAMES E. SWANN et al.,

Plaintiffs,

v.

THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION et al.,

Defendants.

Case No. 3:65-CV-1974-P

MICHAEL P. GRANT et al.,

Plaintiff-Intervenors,

v.

THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION et al.,

Defendants.

ORDER

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THESE MATTERS are before the Court on a Motion by Plaintiff Capacchione and Plaintiff-Intervenors Grant et al. (hereinafter collectively "Grant"), filed April 16, 1999, for Sanctions against Charlotte-Mecklenburg Board of Education for Non-Disclosure of Witnesses [document no. 152]. Defendants Charlotte-Mecklenburg Schools et al. ("CMS") filed a response on April 19, 1999.

The trial in this consolidated action began on April 19, 1999. In a pretrial conference held on April 13, 1999, Grant orally moved the Court to sanction CMS for refusing to identify its trial witnesses. To that date, CMS only had identified five expert witnesses and one non-expert witness. During the conference, the Court ordered CMS (and all parties) to exchange witness lists by the following morning. On April 14, 1999, three business days before trial, CMS disclosed a witness list naming 174 potential trial witnesses.[1] The overwhelming majority of these witnesses were never disclosed previously. Thus, Grant filed the instant motion on April 16, 1999. In the motion, Grant asserts that CMS's non-disclosure gives rise to extreme prejudice and is a violation of this Court's Order on September 16, 1998.

On September 16, 1998, the Court ruled on a Motion to Compel by Grant. Grant had propounded an interrogatory to CMS in May 1998 that asked CMS to identify those persons it expected to call as witnesses at trial and to provide a summary of the subject matter of each witness's testimony. CMS only disclosed the six witnesses mentioned above. The Court ruled that any further disclosures were perhaps premature "at this time," but the Court ordered that "CMS must

[1]CMS's list included 44 of its own witnesses, 53 rebuttal witnesses (principals and teachers of the plaintiffs' children), and 77 witnesses incorporated from the other parties' lists (32 from Grant; 45 from the Swann Plaintiffs). CMS also reserved the right to call more witnesses.

supplement its response, as it promised, when such information becomes known." (Order of Sept. 16, 1998, at 7.)

The Court has expressed its concern on several occasions throughout the discovery period in this case that CMS was lacking candor in disclosing relevant and important information. This is clearly one of those occasions. First, presenting a list of 174 witnesses, most of whom were previously unidentified, just three business days before trial is extremely prejudicial to opposing counsel. Under such circumstances, Grant is denied the ability to effectively cross-examine the witnesses and must conduct fishing expeditions during trial.

Second, CMS's explanation for failing to disclose the information earlier is based on a tortured reading of the Court's Order of September 16, 1998. The Court specified the manner of disclosure of the information—"when such information becomes known"—and this Court's Order overrides the Pretrial Order or any other rule otherwise applicable. In a case of public importance such as this, certainly CMS knows that its actions amount to unfair legal maneuvering. CMS was not substantially justified in its dilatory tactics. The disclosure of such basic information as potential trial witnesses—information normally required much earlier under Rule 26 of the Federal Rules of Civil Procedure[2]—is fundamental to a fair trial. CMS was simply playing games, and such conduct is inexcusable.

Third, it appears that many of CMS's witnesses may be irrelevant or unnecessarily cumulative. Without exception, the Court will allow CMS to present any witness that is a party, its

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[2]While the provisions of Rule 26(a), requiring disclosure of trial witnesses 30 days before trial, may be superseded by a pretrial order, the policy of early disclosure cannot be ignored. While the Court's Pretrial Order requires parties to lodge witness lists *with the Court* on the first day of trial, CMS cannot reasonably assert that this allows them to conceal the identities of its possible witnesses until that time comes, especially when the Court ordered them to produce such information as soon as it became available.

expert witnesses, and anyone previously deposed or interviewed by Grant. Beyond that, the Court believes that the prejudice may be cured only by granting a continuance during the trial and allowing Grant to depose CMS's other named witnesses.

Accordingly, the Court will continue this trial for one week following the presentation of Grant's evidence. During that week, Grant may interview or depose any of the twenty-six witnesses named in CMS's Revised Witness List, which was filed with the Court today. CMS will be responsible for all attorneys' fees and expenses incurred by Grant in seeking this continuance and in conducting these depositions and/or interviews.

NOW, THEREFORE, IT IS ORDERED that Grant's Motion for Sanctions against Charlotte-Mecklenburg Board of Education for Non-Disclosure of Witnesses [document no. 152] be, and hereby is, **GRANTED**.

This the 23rd day of April 1999.

THE HONORABLE ROBERT D. POTTER
SENIOR UNITED STATES DISTRICT JUDGE