Nos. 03-6389, 03-6628

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

PEOPLE FIRST OF TENNESSEE,

Intervenor-Appellant

WEST TENNESSEE PARENT GUARDIAN ASSOCIATION,

Intervenor-Appellee

v.

STATE OF TENNESSEE; DON SUNDQUIST,
Governor of the State of Tennessee; MARJORIE NELLE CARDWELL,
Commissioner, Tennessee Department of Mental Health and Mental Retardation;
MAX JACKSON, Superintendent, Arlington Development Center,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

PROOF REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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SUMMARY OF ARGUMENT

A court's denial of the right to cross-examine and rebut available witnesses clearly is legal error. Appellee West Tennessee Parent Guardian Association (PGA) has cited no authority contradicting this Court's precedent on this point, and cannot evade that precedent by suggesting that the Mediation Settlement Agreement's (MSA) proponents waived their rights to cross-examination or rebuttal. The district

court ruled that PGA was bound by its stipulation and could not present evidence opposing the MSA. At the same hearing, the court stated that it would allow the testimony of Dr. Theodore Kastner and the other PGA witnesses *solely as a proffer* to aid this Court in the event that PGA appealed the denial of its proffered evidence. The parties supporting the MSA repeatedly reserved their rights to cross-examine and rebut that testimony in the event that it was later admitted. But the district court reversed its ruling without notice to the parties and considered the proffered evidence without allowing the parties to exercise their reserved rights. This is legal error requiring a remand, and harmless error analysis does not apply.

Even if it were necessary to demonstrate prejudice, and if this Court assumes that the testimony of PGA's Abuse and Neglect Committee (ANPC) member witnesses is cumulative of the earlier deposition of ANPC member Sharon Williams, the district court's order must be vacated and remanded. The district court's order leaves no doubt that the district court's denial of the proposed settlement agreement was significantly influenced by the proffered testimony of Dr. Kastner, the only expert who testified in opposition to the MSA. His testimony was not cumulative of Williams' deposition or of the brief written statements sent to the court by the "professionals" cited by PGA.

Finally, PGA continues to suggest that the MSA was the first agreement in this case that contemplated closing the Arlington Developmental Center (Arlington) within a specific time period. It was not. The district court's existing remedial orders call for the State to develop individual treatment plans for each class

member, and to transfer any class member eligible for community placement out of Arlington at a rate of eight residents per month. Pursuant to that process, the State determined that *every* resident currently at Arlington is eligible for a community placement. Thus, if the State fully complied with the existing orders in this case, the last resident would transfer from Arlington to a community placement after approximately three years. In light of these requirements, the MSA called for the State to develop a closure plan for Arlington that would provide specific protections for class members in the community and those awaiting transfer at Arlington during the transition. But the district court's remedial orders had already established that Arlington would ultimately close.

ARGUMENT

A. A court's discretion in admitting evidence does not extend to denying the right to cross-examine and rebut the evidence it admits

In response to appellee People First's brief, PGA states that courts have considerable discretion in admitting evidence when considering the fairness of a class action settlement. (PGA Br. at 39-41).[1] PGA goes too far, however, when it argues that "the Court's reference in its Order to proffered testimony was within the Court's discretion." (PGA Br. at 38). A court's "discretion" does not extend to

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[1] Citations to the United States Proof Brief as Appellant are denoted "U.S. Br." Citations to People First's Proof Brief as Appellant are denoted "People First Br." Citations to the West Tennessee Parent Guardian Association's Proof Brief as Appellee are denoted "PGA Br." Citations to the district court record are denoted "R." Citations to the transcript of the Fairness Hearings on the Mediation Settlement Agreement are denoted "TR."

denying a party the right to cross-examine an available witness. As stated in our opening brief, such a deprivation is legal error. (U.S. Br. at 22-25 (citing *Francis* v. *Clark Equip. Co.*, 993 F.2d 545, 550-551 (6th Cir. 1993); *United States* v. *Mills*, 366 F.2d 512, 516 (6th Cir. 1966); *Spaeth* v. *United States*, 232 F.2d 776, 778 (6th Cir. 1956))). While a court has discretion to limit the extent of cross-examination, it cannot restrict that examination until it "has been substantially and fairly exercised." *Francis*, 993 F.2d at 551. Unsurprisingly, PGA cites no authority contradicting this precedent.

B. Kastner's testimony was expressly admitted as a proffer to aid in the event of an appeal and the settlement's proponents did not waive their right to cross-examine that testimony

PGA selectively quotes the district court, suggesting that the court placed Dr. Kastner's testimony "in the record." (PGA Br. at 48, 56). Kastner's testimony, however, was placed in the record *as a proffer*, not as admitted evidence. When PGA moved to submit Kastner's qualifications as an expert, Tennessee objected that his report was not appropriate even for a proffer. (TR 496, Apx. p. ___). The district court noted the objection and then expressly ruled, "In aid *of this proffer*, I'm going to receive his testimony." (TR 504, Apx. p. ___ (emphasis added); see also TR 416-417, Apx. p. ___ (allowing PGA to proffer testimony "so that the appellate court may have a record of what I did and the testimony that would have been excluded")). As such, the district court could not rely on this evidence in making its ruling.

PGA further cites the district court's statement that "there was no jury to deal

with and the court will certainly separate those matters which are in the record from those that are properly not in the record" to contend that the district court did not consider improper evidence. (PGA Br. at 48, 56 (internal punctuation marks omitted)). But the district court did not follow through on its assurances. Instead, after ruling that PGA was bound by its stipulation and could not present evidence opposing the MSA (TR 416, Apx. p. ___), the district court, without prior notice to the objecting parties, considered that testimony in determining the fairness of the MSA. (R. 1698 Order, p. 11 n.3, Apx. p. ___). Indeed, after stating that Kastner's testimony was a proffer, the court explicitly cited it to support its decision to reject the MSA. (R. 1698 Order, p. 21, Apx. p. ___).

PGA further claims that "[i]n deciding whether to cross-examine or make further response, the proponents of the MSA had ample opportunity to review the proffered testimony of Kastner and Leaper," as if to suggest that the MSA's proponents waived their rights. (PGA Br. at 39). But PGA omits two crucial considerations. First, the decision not to cross-examine Kastner came after the district court ruled that his testimony was not admissible. (U.S. Br. at 13-14; TR 416-417, Apx. p. ___). Second, the proponents expressly reserved their right to cross-examine and rebut the proffered testimony in the event it was later admitted on the merits. (U.S. Br. at 17-19; TR 495, 497, 504, 506, 556-557, Apx. pp. ___). Considered in the proper context, the proponents' decision not to subject Kastner's wide-ranging testimony to cross-examination was prudent and respectful of the court's time. It in no way constituted a waiver. At a minimum, the district court,

once it decided to consider the testimony it told the parties it would *not* consider, should have honored the objecting parties' reservation of their rights by scheduling another hearing for cross examination and rebuttal.

C. PGA does not and cannot contend that Kastner's expert testimony was cumulative to properly admitted evidence because he was the only expert opposing the MSA

PGA contends that the evidence in its proffer "was cumulative of what had been received and reviewed by the Court in and prior to the April 30, 2002 hearing, including the Williams deposition testimony." (PGA Br. at 53, see also PGA Br. at 38). First, as argued *supra*, the error here is not just the improper admission of evidence, but the denial of the right to cross-examine and rebut testimony. That is a legal error requiring remand and is not subject to harmless error analysis. (U.S. Br. at 25-26 (citing *Alford* v. *United States*, 282 U.S. 687, 692 (1931); *Francis*, 993 F.2d at 550)).

Second, the district court's error clearly was prejudicial to the parties. As we stated in our opening brief, had the parties supporting the MSA known that Kastner's testimony would be treated as record evidence, we would have taken the opportunity to object to the admission of his report and of significant parts of his testimony, and to expose material inconsistencies and weaknesses in his assessments during cross-examination. (U.S. Br. at 27-30).

PGA argues that its proffered testimony was cumulative to evidence properly admitted to the record, but this claim is easily refuted. The evidence admitted to the record in opposition to the settlement consisted of the deposition of

Sharon Williams, a member of the ANPC; testimony from the parents and guardians of class members; and approximately 100 written statements from parents, guardians, and other members of the public submitted at the invitation of the district court. Williams' testimony, like that of the other PGA witnesses, was admitted solely as a proffer. (TR 632, Apx. p. ___). While PGA describes Williams' deposition at length (PGA Br. at 18-24), and claims that almost all of its proffered evidence was cumulative to that deposition (PGA Br. at 26 (Leaper), 29 (Thayer), 32 (Cowans)), the district court did not mention Williams' deposition or her testimony in its opinion. It did, however, describe the *proffered* testimony of ANPC members Thayer and Leaper, as well as that of former PGA president Cowans. (R. 1698 Order, pp. 14, 17, Apx. pp. ___).

Moreover, even assuming that the proffered testimony of Thayer, Leaper and Cowans was cumulative of Williams' deposition and the parent and guardian testimony and statements in the record (PGA Br. at 26, 29, 32), Kastner's expert profferred testimony was clearly critical to the court's decision. While there is no explicit statement that Kastner's testimony was cumulative of other admitted evidence at the end of the description of his testimony in PGA's brief (PGA Br. at 32-33), PGA suggests that written statements submitted by "professionals" Jeffrie Bruton and Dr. John Scott, Sr., provided similar evidence supporting denial of approval, (PGA Br. at 50-51). Mrs. Bruton and Dr. Scott, however, were not offered as experts. Dr. Scott's two page statement did not include a curriculum vitae, and asserted only that he was a retired psychotherapist who "did a little

observation at the Pennsylvania Hospital in Philadelphia under Psychiatric training supervision." (R. 1613 Notice, Scott Letter, p. 1, Apx. p. __). Unlike Kastner, Dr. Scott did not list any specific experience with patients with developmental disabilities. In fact, Kastner was the only expert witness who testified in opposition to the MSA, and the district court clearly and improperly gave his proffered testimony considerable weight.

As PGA notes, "[t]he purpose of a harmless error standard is to enable an appellate court to gauge the probability that the trier of fact was affected by the error." (PGA Br. at 53-54 (quoting *Haddad* v. *Lockheed Cal. Corp.*, 720 F.2d 1454, 1458-1459 (9th Cir. 1983)). In this case, the district court's order definitively establishes that the court was significantly affected by Kastner's testimony. As we outlined in our opening brief, the district court expressly relied on Kastner's proffered testimony in making findings on two of the three factors counseling against approving the settlement: the objections and concerns of class members, and the public interest. (U.S. Br. at 27 (citing R. 1698 Order, pp. 18-24, Apx. pp. ___)). The district court cited Kastner's testimony that community placements do not have adequate services for individuals with severe behavioral and medical issues, and described Kastner's testimony regarding increased mortality rates for persons in the community as "compelling." (R. 1698 Order, p. 21, Apx. p. ___). The district court nowhere cited the statements submitted by Bruton and Jeffrie.

D. *The existing remedial orders in this case require transferring all current Arlington residents to community placements*

Finally, to aid this Court in its analysis, some facts underlying PGA's arguments require clarification. First, PGA continues to suggest that the MSA was the first action in this case that would have required closing Arlington. Many of the objections from parents and guardians of class members, both in testimony and in written statements, were based on the same mistaken premise. (PGA Br. at 17-18; TR 85, Apx. p. ___; R. 1698 Order, p. 5, Apx. p. ___). In fact, the existing remedial orders in this case require actions that will inexorably lead to closing Arlington, whether or not the MSA is approved. If the State complies with those orders, it will eventually transfer each of the residents currently living at Arlington to a community placement, as all have been approved by hospital staff for such transfer. Because the same court orders prohibit the State from admitting new patients to Arlington, Arlington ultimately will have no residential patients.

1. As we outlined in our opening brief, the Community Plan entered as an order in this case in 1997 requires Tennessee to develop individual treatment plans for each class member and, consistent with those plans, to move an average of eight residents a month out of Arlington and into an appropriate community placement. (U.S. Br. at 7-8). The State has developed the required plans and determined that every resident presently at Arlington is eligible for community placement.

At the time of the fairness hearing, there were approximately 236 residents at Arlington. If, as required by the remedial order, eight of those residents moved

into community placements each month, the last residents would have transferred out of Arlington after approximately three years. Transfers are, however, subject to the approval of the court monitor. Before any class member is transferred, the court monitor or her permanent staff visits the proposed placement to make sure that the appropriate accommodations and trained staff are in place. (TR 77-78, Apx. pp. ___). The court monitor testified that she will not approve a transition until a "quality provider" is available, thereby protecting each resident from an improper placement. (TR 88, Apx. p. ___). At the time of the fairness hearing, there were three or four residents moving into community placements each month. (U.S. Br. at 8; TR 87, Apx. p. ___).

The MSA called for the State to develop a closure plan to ensure that the interests of class members, both those in community placements and those awaiting transfer at Arlington, were protected during this transition process. The plan, which was subject to review by all parties and approval by the district court, was to provide for Arlington to close within three years of that approval, a time line consistent with that projected under the current remedial orders.

2. In describing the testimony of former PGA president Cowans about the MSA negotiations, PGA states that "Cowans felt that the measures taken during the mediation to include closure of ADC as a provision and to persuade PGA Board to approve the document were intimidation." (PGA Br. at 31). Cowans testified that at a meeting to present the settlement to the full Board, the mediation facilitator told the PGA Board that even if it did not sign the agreement, the other parties would

execute and implement the agreement. *Ibid*. PGA's claim that the other parties did not rebut Cowans' testimony as incomplete. At the urging of the district court, the MSA's proponents cross-examined Cowans on this point and proved to the court's satisfaction that there was no coercion involved in the PGA Board's approval of the MSA. (See U.S. Br. at 19 n.2; TR 625, Apx. p. ___). As Cowans explained during her cross-examination, PGA's counsel was present when the mediator made this claim. The PGA Board thus had the opportunity to discuss the issue with its counsel, and counsel informed the Board that because it was a party to the lawsuit, it could not be eliminated from the implementation process. (TR 619-620, Apx. pp. ___). Furthermore, the PGA Board did not vote on the agreement at that initial presentation, but rather adjourned without taking a vote and reconvened a week later, when it approved the MSA. (TR 622, Apx. p. ___).

CONCLUSION

This Court should vacate the district court's order denying approval of the Mediation Settlement Agreement and remand to the district court for further proceedings to allow the United States and People First to cross-examine and rebut the proffered testimony.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 2,716 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2004, a copy of the PROOF REPLY BRIEF FOR THE UNITED STATES AS APPELLANT was served upon counsel of record by first-class mail at the addresses listed below.

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