

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF ALABAMA  
 NORTHEASTERN DIVISION**

**INDIA LYNCH, by her parent, )  
 SHAWN KING LYNCH, et al., )  
 individually and on behalf of )  
 others similarly situated, )**

**Plaintiffs, )**

**vs. )**

**Civil Action No. 08-S-450-NE**

**THE STATE OF ALABAMA; )  
 BOB RILEY, in his official )  
 capacity as Governor of the State )  
 of Alabama; and TIM RUSSELL, )  
 in his official capacity as )  
 Commissioner of Revenue for the )  
 State of Alabama, )**

**Defendants. )**

**ORDER ON MOTIONS**

This action is before the court on “Defendants’ Motion for Miscellaneous Relief” (doc. no. 191), asking the court to continue the August 3, 2010 hearing to take and preserve the testimony of Dr. Robert J. Norrell until such time as the court rules upon defendants’ motion for summary judgment,<sup>1</sup> defendants’ motion to strike materials from the plaintiffs’ response brief to defendants’ motion for summary judgment,<sup>2</sup> and defendants’ *Daubert* motion to exclude the testimony of Drs. Robert

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<sup>1</sup> See doc. no. 152 (defendants’ motion for summary judgment).

<sup>2</sup> See doc. no. 170 (defendants’ motion to strike materials from plaintiffs’ response brief).

J. Norrell, Wayne Flynt, Jeff Frederick, and Henry M. McKiven, Jr.<sup>3</sup> Upon consideration of the motion, “Plaintiffs’ Opposition to Defendants’ Motion for Miscellaneous Relief” (doc. no. 192), and the motions and related pleadings referenced hereafter, the court enters the following orders.

As the basis for defendants’ subject motion, seeking so-called “Miscellaneous Relief,” defense counsel correctly observe that:

Defendants’ Motion for Summary Judgment, *Daubert* Motion to Exclude the Testimony of Drs. Norrell, Flynt, Frederick and McKiven, and Motion to Strike Materials from Plaintiffs’ Response Brief to Defendants’ Summary Judgment Motion have all been pending before the Court for more than three months. Each of those three motions raises issues which, if decided in Defendants’ favor, would negate the need for a hearing to take and preserve Dr. Norrell’s testimony. Accordingly, Defendants respectfully request that the hearing scheduled for August 3, 2010, be continued until the Court has had time to fully consider and rule on those motions.

Doc. no. 191, ¶ 1, at 2. This court regrets the delay referenced by counsel, but has

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<sup>3</sup> See doc. no. 163 (defendants’ *Daubert* motion). As an alternative to this last motion, insofar as it seeks the exclusion of the testimony of Dr. Norrell, defense counsel ask for “the opportunity to take the deposition of Dr. Norrell with respect to the new opinions and materials cited in [his] Declaration.” Doc. no. 191, at 1.

In the alternative, Defendants submit that [the August 3, 2010 hearing to take and preserve the testimony of Dr. Norrell] would be premature and prejudicial to Defendants because Defendants have not had the opportunity to depose Dr. Norrell regarding a wide variety of expert opinions and evidentiary sources included in Dr. Norrell’s Declaration but absent in his expert report.

*Id.* ¶ 2, at 2.

been handicapped in addressing pending motions and other matters in a more timely manner due to health issues.<sup>4</sup> In addition, and even though this court acknowledges the importance of the present controversy, there are other cases on the court's docket that have demanded attention since the referenced motions were filed.

Nevertheless, having now had ample time to thoroughly review most of the pending motions, briefs of counsel, and related evidentiary submissions, it is ORDERED, ADJUDGED, and DECREED as follows:

1. "Defendants' Motion to Strike Materials from Plaintiffs' Response Brief to Defendants' Summary Judgment Motion" (doc. no. 170) is OVERRULED and DENIED;
2. "Defendants' *Daubert* Motion to Exclude the Testimony of Drs. Robert J. Norrell, Wayne Flynt, Jeff Federick[,], and Henry M. McKiven, Jr." (doc. no. 163) is OVERRULED and DENIED;
3. "Defendants' *Daubert* Motion to Exclude the Testimony of Professor Susan Pace Hamill" (doc. no. 162) is OVERRULED and DENIED; and,
4. having concluded that there are genuine issues of material fact that preclude the entry of judgment as a matter of law, *see* Fed. R. Civ. P. 56(c)(2), "Defendants' Motion for Summary Judgment" (doc. no. 152) is OVERRULED and DENIED.

It follows from the foregoing rulings, therefore, that "Defendants' Motion for

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<sup>4</sup> The undersigned judicial officer underwent nine hours of open-heart surgery at Vanderbilt University Hospital on May 18, 2009, for replacement of a congenitally-defective aortic valve and bypass of the left descending artery on the front of his heart. Shortly after defendants' motion for summary judgment was filed on Mar. 1, 2010, this judge developed a cardiac arrhythmia that progressed from atrial flutter to atrial fibrillation. When medications did not resolve the condition, a hospital admission for performance of an electrical cardioversion was required.

Miscellaneous Relief” (doc. no. 191) is due to be, and the same hereby is, OVERRULED and DENIED as moot.<sup>5</sup> The hearing to take and preserve the testimony of Dr. Robert J. Norrell shall occur as previously ordered. *See* doc. no. 189.

The following motions remain pending for further consideration by the court:

(a) “Plaintiffs’ *Daubert* Motion to Exclude the Testimony of Professor David Brunori” (doc. no. 144); (b) “Plaintiffs’ Motion to Exclude [the] Testimony and Report of Dr. William Stewart” (doc. no. 146); and (c) “Plaintiff’s Motion to Exclude [the] Testimony and Report of Dr. S. Jonathan Bass” (doc. no. 148).

**DONE** and **ORDERED** this 29th day of July, 2010.

  
United States District Judge

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<sup>5</sup> This ruling applies to all aspects of the motion for so-called “Miscellaneous Relief,” including the alternative aspect seeking a continuation of the subject hearing in order to allow time for an additional deposition of Dr. Norrell. *See supra* note 2.