IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

William L. Ridenour and Tommy Lee Brown,	:	
	:	Civil Action 2:10-cv-00493
Plaintiffs	:	Judge Economous
v.	:	Magistrate Judge Abel
Ohio Department of Rehabilitation and Correction, *et al.*,	:	
Defendants		

ORDER

This matter is before the Magistrate Judge on plaintiffs William L. Ridenour and Tommy Lee Brown's July 10, 2013 motion for the appointment of an independent medical expert witness (doc. 131); plaintiffs' July 17, 2013 motion to compel answers to interrogatories and production of documents (doc. 133); plaintiffs' August 14, 2013 motion for spoliation of evidence sanctions (doc. 139); and defendants' August 28, 2013 motion for leave to file a sur-reply instanter (doc. 141) .

Appointment of an Independent Medical Expert Witness. Plaintiffs seek the appointment of an independent medical expert to perform comprehensive medical evaluations of them pursuant to Rule 706(b) of the Federal Rules of Evidence. Plaintiffs' motion is premature. At this point in the litigation, there has been no evidence before the Court for which the assistance of an medical expert has been required.

Motion to Compel. Plaintiffs seek an order compelling defendants Knab, Brooks, Burton, Wittrup, Brunsman and Bobb-Itt to answer interrogatories and produce documents in response to plaintiffs' September 10, 2010 First Set of Interrogatories and Requests for Production of Documents. An earlier filed motion to compel was not addressed by the Magistrate Judge because plaintiffs had failed to point to particular discovery requests and the corresponding responses with sufficient specificity necessary to make a complete ruling on plaintiffs' motion to compel. Plaintiffs have filed this motion to address the earlier motion's deficiencies.

It appears that defendants failed to provide any responses to the interrogatories or produce any documents other than plaintiffs' medical records. In response to the motion, defendants argue the Court previously ruled that defendants were not required to respond to the discovery requests and cite to document 112 at PageID 829. Defendants also argue that plaintiffs never resubmitted the requests to defendants prior to the close of discovery on June 3, 2013 and that the identical requests/responses were made/supplied by the defendants' supplemental discovery responses.

Defendants reliance on document 112 for the proposition that they were not require to respond to plaintiffs' discovery request is misguided. My January 7, 2013 Order stated:

> I note, however, that it appears that counsel for defendants may not have provided proper responses to plaintiffs' requests for discovery. In a September 6, 2012 letter to plaintiffs, counsel for defendants wrote:
>
> > [I]n reviewing the discovery requests attached to your Motion to Compel, for the most part, the discovery requests

> focus on issues relating to establishing friable asbestos exposure within in the Chillicothe correctional Institution ("CCI"). This matter was fully addressed and resolved in *Smith v. Ohio Department of Rehabilitation and Correction*. Pursuant to the dismissal entry in *Smith v. Ohio Department of Rehabilitation and Correction*, "the only issues remaining are individual claims for personal injury or other types of money damages relating to alleged exposure to friable asbestos, in violation of the Eighth Amendment." Therefore only your requests for your grievance documents, the ability to review your medical records and obtain copies of the same, to know the location of identified asbestos as well as the areas you resided in within CCI are relevant.
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> Doc. 56-1 at PageID # 543. From this response, it is not clear if defendants ever provided any other response or objection to plaintiffs' requests for discovery. *If counsel's September 6, 2012 letter consisted of its sole objection to the requests, it is not sufficient and does not comply with the discovery rules*. Under Rule 33 of the Federal Rules of Civil Procedure, each interrogatory must be answered separately and fully in writing under oath. Fed. R. Civ. P. 33(b)(3). Grounds for objecting to an interrogatory must be stated with specificity. Fed. R. Civ. P. 33(b)(4). Furthermore, "[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." *Id.* Rule 34 has similar requirements. A response to a request for production of documents must contain a response to each item and state that inspection will be permitted or state an objection to the requests. Fed. R. Civ. P. 34(b)(2).

Doc. 76 at PageID# at 673-74 (Emphasis added). In response to plaintiffs' motion to compel, defendants have not submitted any evidence that they provided responses to plaintiffs' discovery requests demonstrating that they did in fact provide responses to plaintiffs' request for interrogatories other than letter cited above. If that is this case, this response does not comply with the discovery rules. Defendants' assertion that plaintiffs to resubmit their discovery requests is disingenuous. My January 7, 2013 Order directed defendants to provide responses to plaintiffs' discovery requests within thirty days of

the date of that Order. Plaintiffs were not required to "resubmit" their requests for discovery to defendants. Plaintiffs' July 17, 2013 motion to compel answers to interrogatories and production of documents (doc. 133) is GRANTED. Defendants are ORDERED to provide responses to plaintiffs' requests for discovery within fourteen (14) days of the date of this Order.

Spoliation of Evidence. Plaintiffs maintain that at least 146 pages of documents are missing from Brown's medical record. Ridenour asserts that x-ray reports from 1985 through 1995 are missing from his record.

In response, defendants argue that plaintiffs' claims that documents are missing from the medical records are unfounded. Defendants maintain that there is no evidence to support the assertion that the records are incomplete. Plaintiffs bear the burden of showing that defendants acted in bad faith in destroying potentially useful evidence.

Spoliation is "the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004). A party can be sanctioned for destroying evidence if it had a duty to preserve it. *Zubulake v. USB Warbug, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. *Id.* The party seeking a spoliation instruction must first demonstrate that the documents did in fact exist at one time. *See, e.g., Otero v. Wood*, 316 F. Supp. 2d 612, 619 (S.D. Oh. 2004) and

Hadi v. State Farm Ins. Companies, No. 2:07-cv-0060, 2008 WL 687166, at *3 (S.D. Oh. Mar. 11, 2008). Because plaintiffs have failed to show that the documents did in fact exist, their August 14, 2013 motion for spoliation of evidence sanctions (doc. 139) is DENIED.

Conclusion. plaintiffs William L. Ridenour and Tommy Lee Brown's July 10, 2013 motion for the appointment of an independent medical expert witness (doc. 131) is DENIED without prejudice. Plaintiffs' July 17, 2013 motion to compel answers to interrogatories and production of documents (doc. 133) is GRANTED. Defendants are ORDERED to provide responses to plaintiffs' requests for discovery within fourteen (14) days of the date of this Order. Plaintiffs' August 14, 2013 motion for spoliation of evidence sanctions (doc. 139) is DENIED. Defendants' August 28, 2013 motion for leave to file a sur-reply instanter (doc. 141) is GRANTED.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and Eastern Division Order No. 91-3, pt. F, 5, either party may, within fourteen (14) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

s/Mark R. Abel
United States Magistrate Judge