

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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Estate of STEVEN BRODER, by James H. Jackson,  
personal representative,

Plaintiff,

vs.

File No. 03-75106

Hon. Marianne O. Battani

Mag. Judge Paul J. Komives

CORRECTIONAL MEDICAL SERVICES, INC.,  
its medical director CRAIG HUTCHINSON, and  
BENCY MATHAI, and employees of the Michi-  
gan Department of Corrections, namely GEORGE  
PRAMSTALLER, medical director, and JAN EPP,  
regional medical director, all in their individual  
capacities,

Defendants.

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**PLAINTIFF'S MOTION TO STRIKE DEFENSE EXPERT'S REPORT**<sup>1</sup>

**Relevant Proceedings to Date**

Early in this case, Judge Rosen dismissed the corporate defendant CMS, Inc. (R. 35, Order of Dismissal.) In CMS's place, Judge Rosen allowed the plaintiff to substitute the CMS medical director, Dr. Craig Hutchinson. (R. 45, Order.) Dr. Hutchinson (along with the other CMS defendant Dr. Mathai) hired expert witnesses who duly issued their reports and were deposed by the plaintiff in 2006. At that time, the issues in the case were limited to whether or not Mr. Broder's 2001-02 cancer was timely diagnosed and treated, and whether or not any delays in his diagnosis and treatment were attributable to the medical policies or practices authorized or implemented by CMS through the person of Dr. Hutchinson. Discovery as to those issues ended in 2006, well before the defendants moved for summary judgment.

In late 2007, the plaintiff moved to re-instate CMS, Inc., as by then new case law had

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<sup>1</sup> The plaintiff sought the concurrence of CMS's counsel before filing this motion, but no response was forthcoming.

made it clear that CMS should not have been dismissed. (R. 109, Pl's Motion to Re-instate.) In March 2008, the Court denied the CMS defendants' motion for summary judgment. (*See* R. 113, Opinion and Order.) The Court also re-instated CMS, Inc., as a party-defendant. (*See* R. 114, Opinion and Order.)

### **Proceedings Since 2008**

In early 2008, Mr. Broder was again diagnosed with throat cancer. The new question presented (for purposes of this case) was whether or not the 2007-08 cancer was the same as (or was directly linked to) the 2001-02 cancer, and thus could be attributed to the alleged 2001-02 medical malpractice of Dr. Mathai or the deliberate indifference of the other defendants.

At a court hearing in 2008, the Court re-opened discovery on that new issue, and set schedules for expert reports and depositions limited to that issue. At that hearing, the attorney for CMS, Inc., *also* asked that CMS, Inc., be allowed to procure a new expert as to the claim against the newly re-instated corporation – namely on the question of whether or not the 2001-02 delays in Mr. Broder's diagnosis and treatment were attributable to medical policies or practices authorized or implemented by the corporate defendant CMS, Inc.

The plaintiff objected to this request, on the grounds that CMS, Inc.'s interests and the interests of its medical director Dr. Hutchinson were perfectly aligned. (In fact, the first report had referred to "Dr. Hutchinson and/or CMS" nearly every time Dr. Hutchinson was mentioned. *See* Exhibit 1.) The plaintiff argued that whatever the first expert had said about the CMS policies and practices could and should be used by the re-instated defendant CMS, Inc., because as to those policies and practices, CMS and its medical director were indistinguishable. The plaintiff was concerned that CMS, Inc.'s request for a new expert to protect its *separate interest* was

simply a way to get a second bite at the apple with a new and better defense expert.<sup>22</sup>

Defense counsel responded that because CMS, Inc., had been out of the case at the time the “corrections medicine” expert had issued his report and had been deposed, the corporation – *as a separate entity* – should have the right to hire its own expert as to its policies and practices.

The Court agreed and ordered that CMS, Inc., could get its own corrections medicine expert. (R. 132, Order.)

### **Argument**

On May 15, 2009, the new expert’s report was filed. (See Exhibit 2, attached.) Instead of being limited to CMS, Inc., however, the new report was filed on behalf of *all three* CMS defendants – CMS, Inc., Dr. Mathai, and Dr. Hutchinson. Just as the plaintiff feared, the report is plainly intended not to *supplement* the earlier expert report of Dr. Norman (filed on behalf of Drs. Hutchinson and Mathai), but to replace that report entirely.

Far from being limited to the alleged interests of the *separate legal entity* CMS, Inc., the new report goes far beyond CMS’s corporate policies and practices – that defense counsel said existed apart from the interests of the other doctors – and focuses as much on the acts or omissions of Dr. Mathai and Dr. Hutchinson (as well as other non-CMS treating physicians). At bottom it is a report that re-argues the liability of the individual defendants. The two reports are strikingly similar in this regard. Indeed, putting them side by side, it is hard to see why a separate report was needed at all.

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<sup>22</sup> On cross-examination, the first defense expert on prison policies and practices (Dr. Norman) had agreed with the plaintiff about some of the deficiencies in the prison medical system, as well as about the tardiness of Mr. Broder’s diagnosis and treatment. Indeed, the defense expert supported the plaintiff’s case enough that he confirmed the decision that no plaintiff’s expert on prison policies and practices was necessary.

Moreover, the last two pages of the report go to “standard of care” issues that are only implicated by the state-law medical malpractice claim against Dr. Mathai individually. There is no medical malpractice claim in the case against CMS, Inc., that would require an expert’s report on that issue.

If the plaintiff had known that discovery was to be re-opened entirely as to *all* issues facing *all* CMS defendants going back to 2001-02, then he would have asked for the comparable right to get a plaintiff’s expert report on prison policies and practices or “corrections medicine.” If the new expert report is to be accepted, then the plaintiff should be given that right, now.

But looking at the two expert’s reports side by side, the Court can see that in fact there was no need for a second report at all, other than to substitute a different defense expert for all three CMS defendants. Accordingly, the Court should strike the new “corrections medicine” report of Dr. Barth.

### **Conclusion**

For the above reasons, the plaintiff asks the Court to strike the new expert’s report as contrary to the reasons given for why a “separate” report for CMS, Inc., was needed in the first instance, and as beyond the scope of what the Court ordered (solely for CMS, Inc.) in granting its request for a separate report. (*See* R. 132. Order.)

Respectfully submitted,

s/ Paul D. Reingold  
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Dated: May 20, 2009

**Index of Exhibits**

1. Dr. Norman's original report for Hutchinson and Mathai
2. Dr. Barth's new report for CMS, Inc., Hutchinson, and Mathai

**Proof of Service**

On May 20, 2009, the above motion to strike, together with the attachments and this proof of service, were filed using the court's ECF system, which will send e-mail service to all counsel of record.

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