

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
NORTHERN DIVISION

MARY TROUPE, ET AL.

PLAINTIFFS

VS.

CIVIL NO. 3:10CV153HTW-MTP

HALEY BARBOUR, ET AL.

DEFENDANTS

**TELEPHONIC STATUS CONFERENCE**

BEFORE THE HONORABLE HENRY T. WINGATE  
UNITED STATES DISTRICT JUDGE  
DECEMBER 17TH, 2015  
JACKSON, MISSISSIPPI

APPEARANCES: (via phone)

FOR THE PLAINTIFFS: MS. BROOKE L. McCARTHY  
MS. VANESSA JUDITH CARROLL  
MR. JODY E. OWENS, II

FOR THE DEFENDANTS: HAROLD E. PIZZETTA III

FOR U.S. DEPARTMENT OF JUSTICE: MS. DEENA FOX  
MS. ELIZABETH KELLEY  
MS. MITZI DEASE PAIGE

REPORTED BY: MARY VIRGINIA "Gina" MORRIS, RMR, CRR

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501 East Court Street, Suite 2.500  
Jackson, Mississippi 39201  
(601) 608-4187

1 THE COURT: All right. This is Judge Wingate. Good  
2 morning to you.

3 (ALL RESPONDED "GOOD MORNING, YOUR HONOR")

4 THE COURT: Do we need anyone else to join us?

5 MR. PIZZETTA: Not from the defendants, your Honor.

6 MS. FOX: Not from the United States.

7 MR. OWENS: No, your Honor.

8 THE COURT: And what about the plaintiff?

9 MR. OWENS: We have all we need, your Honor.

10 THE COURT: Who initiated the call?

11 THE CLERK: We initiated the call.

12 MR. OWENS: DOJ.

13 THE COURT: When you speak out, you need to identify  
14 yourselves.

15 MR. OWENS: Jody Owens, your Honor. I think I  
16 responded to your question about who initiated the phone call  
17 was DOJ.

18 THE COURT: Okay. Then talk to me.

19 MS. FOX: Your Honor, this is Deena Fox from the  
20 Department of Justice. We requested the status conference  
21 because when we spoke at the end of September, we had reported  
22 to the court that the parties were concluding negotiations and  
23 had been in productive discussions in hopes of resolving the  
24 *Troupe* matter as well as part of the United States  
25 investigation related to -- and findings related to the State's

1 services for individuals with disabilities. And at that time  
2 we hoped that we would be able to report shortly on reaching a  
3 resolution.

4           Unfortunately, the parties were not able to reach a  
5 resolution. And so we wanted to update you on the progress and  
6 the fact that we had reach impasse at this time because we know  
7 that you were waiting for that update in terms of considering  
8 the motions that were before you related to the *Troupe* matter.

9           And at this point we -- while always open to working  
10 out a resolution outside of litigation and, hopefully, at some  
11 point in the future the State would be willing to reach a  
12 negotiated agreement, at this time we do not foresee that. And  
13 we would urge the court as a result to address the outstanding  
14 motions and schedule -- and order a scheduling conference so  
15 that the parties can move forward quickly to address these  
16 longstanding issues on which we have continued serious  
17 concerns. Children in the state have been waiting for far too  
18 long for services in the community and are currently in  
19 institutions unnecessarily as a result.

20           THE COURT: All right. Now, since you are speaking,  
21 then I will direct my questions to you first. Did the parties  
22 even get close in resolving this matter?

23           MS. FOX: Your Honor, we spent at least eight months  
24 negotiating the substance of an agreement and had almost  
25 reached agreement on the substance, but there were some key

1 issues that we were unable to resolve. And we spent a few  
2 months on those final issues and, unfortunately, we were not  
3 able to bridge the gap.

4 THE COURT: And at what point did the discussions  
5 break down, that is, how long ago?

6 MS. FOX: I think the final communications between  
7 leadership in both offices occurred about two to four weeks  
8 ago.

9 THE COURT: And when the negotiations failed, in whose  
10 court was the ball at that time? Had someone made a demand or  
11 had someone made an offer to which the other side had either  
12 failed to respond or refused the prospective offer?

13 MS. FOX: The United States proposed a final offer  
14 earlier this fall, and the State ultimately was not willing to  
15 agree to those terms.

16 THE COURT: Did the State in return offer some  
17 alternative suggestions?

18 MS. FOX: The alternatives that the State proposed --  
19 we didn't receive an alternative in writing, though one was  
20 offered verbally. And the general contours we do not believe  
21 were in line with anything that the Department could agree to  
22 at this time.

23 THE COURT: All right. Now let me turn to the State.  
24 Who will be speaking for the State?

25 MR. PIZZETTA: Your Honor, this is Harold Pizzetta on

1 behalf of the State. I think that's by and large accurate, but  
2 I think it might leave out a couple of facts that might be  
3 relevant to the court.

4           The Department of Justice, not -- and the plaintiffs,  
5 not the State, declared the impasse and ended the negotiations.  
6 It wasn't a verbal offer that we made. The attorney general  
7 himself e-mailed the offer to Ms. Gupta, Vanita Gupta, at the  
8 Department of Justice. And Ms. Gupta responded by saying she  
9 could not accept the State's offer and, therefore, was  
10 declaring an impasse. They walked away from the table, not us.

11           But I want to be perfectly clear, your Honor. I think  
12 both parties have tried very, very hard to reach a resolution  
13 on it. And the posture that we're in, your Honor, without  
14 giving too much detail on it, is the parties really reached an  
15 agreement or almost an agreement on a very extensive document,  
16 a number of substantive provisions. But, by and large, the  
17 negotiations broke down over whether or not the document was  
18 going to be a consent decree or whether it was going to be some  
19 other type of document having to do with enforceability  
20 provisions.

21           So the parties are -- on one aspect, as you say, are  
22 the parties in agreement on what they'd like to see happen in  
23 the state? There's a lot of agreement on that. There's just  
24 this disagreement over consent decree versus private settlement  
25 versus enforcement. So our hope is at some point in time,

1 maybe sooner rather than later, we'd always like to return to  
2 the negotiation table on it, that that final issue can be  
3 bridged.

4           And maybe, your Honor, that -- I don't know if the  
5 court was thinking this way; but when I was hearing you ask the  
6 question, it made me wonder whether or not the magistrate judge  
7 in this case, Judge Parker, who has had some level of  
8 familiarity already, having ruled on the motion to dismiss,  
9 whether getting the parties together in that structured forum  
10 before Judge Parker might lead to bridging that last remaining  
11 gap.

12           But we're always ready to talk. And we did not  
13 declare the impasse. The Department of Justice and plaintiffs  
14 did.

15           THE COURT: Now, you mentioned some document to which  
16 the parties might have agreed initially or at least at some  
17 point. Will that document or any other document that has been  
18 addressed by the parties relative to a stipulation affect any  
19 of the outstanding motions?

20           MR. PIZZETTA: Your Honor, the document that I'm  
21 referencing -- I don't think it does. The document that I'm  
22 referencing is, if you would, a draft settlement agreement,  
23 which is a very extensive document. It's -- but it's not  
24 something that is relevant to -- would change the course with  
25 respect to any of the pending motions.

1           THE COURT: All right. And then with regard to the  
2 State's interest in settlement negotiations, are you saying  
3 that the State wishes to continue?

4           MR. PIZZETTA: Your Honor, we -- we certainly would  
5 like to continue with negotiations.

6           THE COURT: Well, the United States says that it feels  
7 that, you know, the parties have reached an impasse. Do you  
8 feel that there's an impasse then?

9           MR. PIZZETTA: Your Honor, as it stands right now, it  
10 is. And I would not -- and the Department of Justice and the  
11 plaintiffs and I'll say the State as well have acted in the  
12 utmost of good faith in this. I mean, we have tried and tried  
13 and tried. So this is not an aspersion on anyone. It's -- and  
14 so there is an honest to goodness disagreement that is very,  
15 very important to both of the parties' positions.

16           And so the only -- the only hope I sort of hold out  
17 with it is is it one of those impasses that if somebody like a  
18 magistrate judge looks at it -- you know, sometimes magistrate  
19 judges, their ability to see it from a different area can help  
20 convince one party or another that the impasse is not as large  
21 and should be -- and that bridge should be gapped, if you  
22 would.

23           So it is true, your Honor, there is an impasse as it  
24 stands right now. I think we've exhausted the discussions  
25 between us. And the only other question is is there anything

1 else that might shake the parties loose. And I would like to  
2 try a magistrate judge with it, but -- but it is an important  
3 case.

4 THE COURT: Let me turn back to the United States.

5 MS. FOX: Your Honor, we appreciate the State's desire  
6 to continue negotiations. At this point because of the  
7 issue -- as Mr. Pizzetta laid out, the issue around  
8 enforceability, I don't foresee a change in the United States'  
9 position on that issue at this point even with the engagement  
10 of a magistrate.

11 And so I have concern given the lengthy delay in this  
12 case that already has resulted from our attempts to resolve the  
13 issue outside of litigation, I don't think it would be  
14 appropriate for us to hold the case any further while further  
15 attempts are made, even with the help of a skilled mediator at  
16 this point.

17 You know, there may be a time in the future when the  
18 situation is ripe for that kind of discussion, but at this  
19 point I don't think that it would be a useful way to proceed.

20 MR. PIZZETTA: Your Honor, may I make one comment on  
21 that? And if it helps with the parties, I wouldn't necessarily  
22 advocate, your Honor, that your Honor stop work on the case  
23 because of this discussion. But it may not hurt if while the  
24 court is looking at the R and R on the motion to dismiss and  
25 continues in that respect to at the same time ask the parties

1 to gather before the magistrate. It may sort of serve both  
2 ends without causing any kind of issues.

3 THE COURT: What says the United States on that?

4 MS. FOX: Your Honor, I think that the parties will  
5 all be in a better position to kind of assess their positions  
6 and go forward even with a magistrate after the decisions are  
7 reached on the outstanding motions. And I think at that point  
8 I -- I could foresee some benefits of sitting down again and  
9 reassessing where folks are.

10 But I wouldn't want to take the magistrate's time at  
11 this point, you know, or waste your Honor's time with the back  
12 and forth of the parallel tracks. I think we should move ahead  
13 on the existing motions and after that point then maybe revisit  
14 this issue. And I appreciate your -- your time and -- on this  
15 issue.

16 THE COURT: Have these discussions been civil the  
17 entire time? Have the parties been able to confer amicably on  
18 these various matters?

19 MR. PIZZETTA: Your Honor, I think so.

20 MS. FOX: Yes. The parties have been very open and  
21 the conversations between all sides I think have been perfectly  
22 amicable. I don't think that we need the assistance of an  
23 outside party for that reason.

24 THE COURT: And have these negotiations been in  
25 person, by telephone, by e-mail? How?

1 MS. FOX: They've been a combination of in person, by  
2 telephone and e-mail. The most recent rounds that have been by  
3 leadership offices of both the State and the Department of  
4 Justice have been primarily by phone and e-mail, but there have  
5 been many in-person meetings as well.

6 THE COURT: All right.

7 MS. MCCARTHY: And, your Honor, this is plaintiff --  
8 Brooke McCarthy on behalf of the plaintiff, if I could just  
9 chime in for a minute.

10 THE COURT: Okay. Go ahead.

11 MS. MCCARTHY: In terms of the plaintiffs' position,  
12 we do believe that a magistrate judge would not be worthwhile  
13 at this time and that it would probably be a waste of time on  
14 behalf of the magistrate. And, instead, we do want to proceed  
15 on the motions.

16 It's not because -- the impasses that we're at we  
17 don't see a compromise anytime soon. And the  
18 counterproposals by the State that exclude court enforceability  
19 have, you know, substantive issues that we could not agree to.

20 And, therefore, we don't see other avenues at this  
21 time and think that for negotiations to be furthered, the  
22 motions that are pending need to be handled so the parties know  
23 what position they are in the case overall.

24 THE COURT: All right. Thank you. Now, with regard  
25 to these outstanding motions, does any party feel that

1 subsequent developments need to be supplemented to the motion  
2 or to the response, whether by facts or by authorities? Let's  
3 start with the United States.

4 MS. FOX: Your Honor, I think primarily the parties  
5 should address this point, as we've filed statements of  
6 interest on some of the outstanding motions; but, primarily, I  
7 think that it will be on their -- in their court as to whether  
8 they believe they need to supplement.

9 THE COURT: All right. Thank you. Now let's go to  
10 the plaintiff.

11 MS. MCCARTHY: Your Honor, at this time -- this is  
12 Brooke McCarthy -- I do not believe that we need to supplement,  
13 particularly when it comes to plaintiffs' motion to lift the  
14 stay of discovery. The magistrate already, you know, provided  
15 a report and recommendation on that. And, therefore, we do  
16 think at the very least that that definitely does not need to  
17 be supplemented and we be able to proceed on the discovery  
18 matters in that situation.

19 THE COURT: All right. Now to the State.

20 MR. PIZZETTA: I think I'm in agreement, your Honor,  
21 that we're -- that there's no supplement needed. I do want to  
22 make sure, your Honor, that I know which motions we're talking  
23 about that -- and the motion that jumps out to my mind that I  
24 want to address separately is class certification. I want to  
25 make sure I'm remembering where we are on the posture on that.

1           But I think it is accurate to say that pending before  
2 your Honor is the -- is the objection of plaintiffs to the  
3 magistrate judge's R and R that Count 2 in the case be  
4 dismissed. And associated with that is plaintiffs' motion to  
5 lift discovery -- lift the immunity stay and proceed. I think  
6 those two motions, your Honor, which are really the same issue,  
7 are properly pending and fully briefed and ready for the court  
8 to consider.

9           The motion for class certification was also one of the  
10 motions that was referred to the magistrate judge, and that --  
11 consideration of that motion and briefing of that motion has  
12 not progressed beyond just the initial filing of the motion  
13 because of the stay and the pending motion to dismiss on  
14 Count 2.

15           So as I see, your Honor, the way it would work would  
16 be your Honor would resolve the objections to the R and R so  
17 that the parties would know if Count 2 is in the case or out of  
18 the case. That would then lift the stay and then the parties  
19 would proceed back to the magistrate judge for briefing on  
20 class certification, which I imagine at this point plaintiffs  
21 would probably want to refile that because there -- the  
22 pleadings are pre-Walmart. And so I think they'll need to do  
23 some more briefing in light of the change in law from the  
24 United States Supreme Court, but that the class certification  
25 motion and case management issues would then be ripe for the

1 magistrate judge to address.

2           So I wanted to make sure we weren't throwing class  
3 certification in as one of the motions pending before your  
4 Honor, because we haven't gotten very far in that one and it's  
5 still subject to -- it's been referred to the magistrate judge.

6           THE COURT: Now, you have filed a motion to dismiss.

7           MR. PIZZETTA: Yes, sir.

8           THE COURT: Docket number 15.

9           MR. PIZZETTA: Yes, sir.

10          THE COURT: Or motion for judgment on the pleadings.

11          MR. PIZZETTA: Yes, sir.

12          THE COURT: So what's your view as to the ripeness of  
13 that motion for resolution?

14          MR. PIZZETTA: That one is ready, your Honor. And if  
15 I -- if I'm piecing -- if I'm remembering this correctly, that  
16 was one -- that was a motion -- the primary motion -- well,  
17 that was one of the motions sent to the magistrate judge for  
18 the report and recommendation.

19                 And so Magistrate Judge Parker considered all of the  
20 briefing on the motion to dismiss and recommended that it be  
21 granted. And then plaintiffs filed their objections to that  
22 report and recommendation. And so that is what is I think the  
23 number one issue pending before your Honor, and that is the  
24 motion to dismiss by way of the magistrate judge's report and  
25 recommendation that it should be granted.

1           And that -- your Honor, I don't think that -- from the  
2 State's perspective we don't need any further briefing on that.  
3 We think the magistrate judge's recommendation is correct.

4           THE COURT: And what about the motion to strike,  
5 docket number 58, filed by the plaintiffs?

6           MR. PIZZETTA: Your Honor, I believe from the State's  
7 perspective that that has been responded to and is properly  
8 pending before this court without need of any further briefing  
9 from the State, your Honor.

10          MS. McCARTHY: Plaintiffs would agree for the motion  
11 to strike that further briefing would not be necessary.

12          THE COURT: All right. And do you agree with the rest  
13 of the comments made by Mr. Pizzetta as to the status of the  
14 various motions?

15          MS. McCARTHY: Yes. I believe that the motions  
16 pending before your Honor are ready to be ruled on. Class  
17 certification, as he said, is largely dependent on those other  
18 motions and the disposition of them. And, therefore,  
19 plaintiffs would probably at that time, after the disposition  
20 of the other motions, possibly request further time for  
21 supplemental briefing to deal with the Walmart issues and other  
22 factual developments that have occurred in the last five years  
23 since the case has been pending.

24          THE COURT: So then is there any reason to leave this  
25 motion to certify class on the active docket inasmuch as it's

1 contingent upon further briefing? This is to plaintiff.

2 MR. OWENS: Your Honor, this is Jody Owens. We need  
3 to talk about that. Plaintiffs would need to kind of consult  
4 internally, your Honor, to just make that determination whether  
5 it needs to be on the active docket. One of the things we'd  
6 like to discuss would be just how fast the ball gets rolling on  
7 the rulings and how fast we would move.

8 Certainly, I see the court's point that the parties do  
9 agree and acknowledge that there will need to be supplemental  
10 briefing on that, but the plaintiffs certainly want to push --  
11 push this case as hard as possible given the longevity of it.

12 THE COURT: Okay. All right. Any other comments that  
13 need to be addressed by the court or absorbed by the court?

14 MR. PIZZETTA: Not from the State, your Honor.

15 THE COURT: Plaintiffs?

16 MR. OWENS: No, your Honor.

17 THE COURT: Now, let me ask the plaintiffs, you are --  
18 are you in lockstep with the Department of Justice on this  
19 matter of settlement?

20 MR. OWENS: Yes, your Honor. This morning, your  
21 Honor, the plaintiffs did file a notice of termination of the  
22 settlement negotiations to the court with the very things that  
23 the Department of Justice represented to the court.

24 THE COURT: Okay. And back to the United States.  
25 Anything further from the United States?

1 MS. FOX: No, your Honor. We just ask that the case  
2 move forward at this point and appreciate your consideration.

3 THE COURT: All right. I will pull the motions and  
4 begin working on the motions then. And after I get to a  
5 certain point on the motions, I then will advise the parties  
6 what I think about this outstanding motion to certify class and  
7 discuss that with you. But in the meantime I will address the  
8 other motions.

9 Now, the motions that I will be addressing will be  
10 docket number 15, motion to dismiss; the docket number 29,  
11 that's the motion to lift stay of discovery; and docket number  
12 55, report and recommendation; and docket number 58, motion to  
13 strike response in opposition. On docket number 15, it is in  
14 two parts. It's a motion to dismiss or a motion for judgment  
15 on the pleadings.

16 Now, those are the matters the court will be  
17 addressing. The court will hold in abeyance any action on  
18 docket number 2, which is the motion to certify class. And the  
19 court will be back in contact with the parties once the court  
20 has moved towards a resolution of the others. Any questions on  
21 any of these matters?

22 MR. PIZZETTA: No, your Honor.

23 MR. OWENS: No, your Honor.

24 MS. FOX: No, your Honor.

25 THE COURT: All right, then. Thank you all so much

1 and I'll be back in contact.

2 (TELEPHONE CONFERENCE CONCLUDED)

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## CERTIFICATE OF REPORTER

I, MARY VIRGINIA "Gina" MORRIS, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 21st day of December, 2015.

s/ Gina Morris  
U.S. DISTRICT COURT REPORTER