
Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, (a/k/a MASON EDMO),
Plaintiff-Appellee,

vs.

IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellants.
and
CORIZON, INC., et al.,
Defendants-Appellants.

On Appeal from Orders of the United States District Court
For the District of Idaho
Case No. 1:17-cv-00151-BLW

PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANTS-APPELLANTS' JOINT MOTION TO SUPPLEMENT THE RECORD ON APPEAL & PLAINTIFF-APPELLEE'S REQUEST TO STRIKE AND IMPOSE SANCTIONS

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INTRODUCTION

Plaintiff objects to and moves to strike Defendants' motion to supplement the record. Defendants' filing is a substantive brief that Defendants dress up as a "motion" in order to make new arguments regarding the merits of their appeal. All of the "supplemental" materials Defendants seek to add to the record were available to Defendants at the time they filed their opening or reply briefs in this case, and one is in fact already included in the existing excerpts of record. Moreover, as this Court previously ruled, because these documents are part of the district court record, they are already before this Court. It is improper for Defendants, under the guise of a motion to supplement, to make new arguments on the merits that they failed to raise in either their opening or reply briefs.

This is the second time during these proceedings Defendants have attempted to submit a merits sur-brief in order to make a substantive argument they failed to include in their original briefing.[1] This Court should reject Defendants' abuses of appellate procedure. Defendants' actions waste valuable Court resources, and prejudice Plaintiff by improperly requiring Plaintiff to repeatedly respond to substantive merits arguments in the limited 10-day response window for motions rather than the merits briefing schedules carefully set forth by this Court.

Moreover, Defendants' substantive arguments are wrong. First, Defendants' new arguments that the District Court did not grant a permanent injunction or hold a final trial on the merits directly contradict the positions Defendants took in their opening brief. Second, the supplementary materials Defendants submit merely demonstrate that Plaintiff has ongoing claims for injunctive relief and damages that

[1] The first instance was when Defendants filed an "urgent motion to vacate" the District Court's December 13, 2018 Order, Dkt. 31, based on arguments they could have made in their opening brief, but did not, and based on a date they self-selected to meet the "urgency" criteria, which this court determined was not applicable. *See* Dkt. 37.

were not the subject of, nor resolved by, the October trial and the Court's December injunctive relief order. The fact that further claims for injunctive relief and damages remain to be litigated does not bear on whether the District Court granted permanent injunctive relief with respect to the limited claims at issue in the expedited proceeding.

ARGUMENT

I. This Court Should Strike Defendants' "Motion to Supplement" as Improper and Sanction Defendants for Abuse of the Appeals Process

Defendants' "motion to supplement" is an improper attempt to file a sur-response on the merits. Of the six documents Defendants now seek to add to the record, four (Exhibits A-D) were available to Defendants prior to their filing of their opening appellate brief, and two (Exhibits E-F) were available to Defendants when they filed their reply brief.[2] Moreover, this Court already ruled in the context of Plaintiff's earlier motion to supplement the record that such motion was unnecessary because "[t]he district court record is before this court on appeal." Dkt. 85. Despite this clarification, Defendants now move to supplement the record with materials from the district court record in order to make new arguments on the merits of the appeal. Defendants' improper actions "vexatiously increase the cost of litigation" in violation of Ninth Circuit Rule 30-2, and this Court should strike

[2] The reporter's transcript Defendants submit as Exhibit A is from proceedings that took place January 30, 2019. Defendants could have ordered a transcript of these proceedings in time to file it with their opening brief on March 6, 2019. Exhibit B is parties' joint discovery plan filed in the District Court on January 15, 2019, Exhibit C is the District Court's January 31, 2019 Scheduling Order, which Plaintiff already submitted into the Excerpt of Record. SER 016-021. Exhibit D is Plaintiff's Third Amended Complaint, filed in the District Court on January 31, 2019. Exhibits E and F are Defendants' respective Answers to the Third Amended Complaint, filed on March 15, 2019. Defendants' filed their opening brief in this Court on March 6, 2019 and their reply brief on April 17, 2019.

Defendants' motion and sanction Defendants under Ninth Circuit Rules 28-1(a) and 30-2.

Defendants stated they "feel compelled to move to supplement the record on appeal with documents and information that bear on whether the District Court conducted a final trial on the merits and granted Ms. Edmo a permanent injunction." Dkt. 92-1 at 2-3. However, these are not new issues—rather they are issues Defendants themselves already identified in their appellate briefs. In their opening brief, Defendants argued that the District Court's order should be reviewed as a grant of a permanent injunction and that the District Court converted the preliminary injunction hearing into a final trial on the merits. Defendants now move to supplement the record with materials that were available to them at the time they filed their merits briefs in an attempt to raise new substantive arguments about these issues—arguments Defendants could have made in their merits briefs, but did not. This is improper and should not be allowed by this Court.[3] *See Christian Legal Soc. Chapter of Univ. of California v. Wu*, 626 F.3d 483, 488 (9th Cir. 2010) ("CLS simply failed to raise this issue the first time around, and it is not entitled to 'a second bite at the appellate apple.'") (quoting *Kesselring v. F/T Arctic Hero*, 95 F.3d 23, 24 (9th Cir. 1996), *as amended on denial of reh'g* (Oct. 28, 1996)); *Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) (court of appeal will not consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief).

[3] Presumably, Defendants' newly-filed appeal of the District Court's May 31, 2019 Order, D.Ct. Dkt. 23, reflects a similar attempt, which is similarly proscribed. *See Kesselring*, 85 F.3d at 24-25 ("Since appellant failed to raise this issue in its first appeal, it is waived."); *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.) ("We need not and do not consider a new contention that could have been but was not raised on the prior appeal.").

As detailed below, Defendants' motion to supplement directly contradicts Defendants' arguments in their merits briefing. In order for the appellate process to work, this Court and Plaintiff must be able to rely on the finality of the briefing as set forth in the Federal Rules of Appellate Procedure, the Ninth Circuit Rules, and this Court's orders, rather than unending and ever-shifting briefing by Defendants. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) ("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. . . This court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.'") (quoting *Russell v. Rolfs* 893 F.2d 1033, 1037 (9th Cir. 1990) and citing *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600–601 (9th Cir. 1996)). To the extent Defendants wanted to file a supplemental brief responding to the District Court's May 31, 2019 Order, they should have sought permission to do so from this Court. *See* Fed. R. App. P. 28(c) ("The appellant may file a brief in reply to appellee's brief. Unless the court permits, no further briefs may be filed."). Because Defendant's filing does not comport with the Federal Rules of Appellate Procedure and the Ninth Circuit Rules, this Court should strike it under Ninth Circuit Rule 28-1(a).

Moreover, Defendants' unilateral filing of a merits brief packaged as a "motion" prejudices Plaintiff. Defendants purport to be supplementing the record in response to the District Court's May 31, 2019 Order. They filed their motion on June 20, 2019, with notice to Plaintiff only at the end of the business day on June

19, 2019. Thus, Defendants allotted themselves 19 days to prepare their motion, while Plaintiff had only 10 days to respond. This is an abuse of the appellate motions practice. Plaintiff requests that this Court now sanction Defendants for their repeated procedural abuses in order to deter future such conduct. *See Lowry v. Barnhart*, 329 F.3d 1019, 1025 (9th Cir. 2003) ("[M]erely striking appellees' supplemental excerpts seems insufficient to deter abuse.").

II. Defendants' Arguments Directly Contradict Their Own Positions on Appeal

While Defendants characterize their motion to supplement as responsive to new issues raised by the District Court's May 31, 2019 Order, Defendants' argument is belied by their own prior briefing. Defendants' motion to supplement purports to contest "the District Court's recent statements that, in 2018, it held a final trial on the merits, concluded Ms. Edmo had succeed[sic] on her claim for permanent injunctive relief, and issued a permanent injunction." Dkt. 92-1 at 3. Defendants argue that the supplemental records they attach "are inconsistent with any assertion that there was final trial on the merits in October 2018." *Id.* at 4.

In fact, Defendants argued in their opening brief that the District Court granted Ms. Edmo "permanent and mandatory injunctive relief," Dkt. 13-1 at 36, and that this Court should review the District Court's order as "a permanent injunction." *Id.* at 39 ("[B]ecause the injunction grants Ms. Edmo permanent relief, this Court should apply the standard of review for a permanent injunction."); *id.* at 40 ("When reviewing a permanent injunction, the Court reviews the decision to grant the injunction for an abuse of discretion…"). Defendants contended that "the district court's Order reflects that the court treated the hearing as a trial on the merits." *id.* at 72, and set forth one of the issues to be decided on appeal as, "Did the district court err in converting the abbreviated preliminary injunction hearing to a full and final trial on the merits without providing proper notice to the parties?"

Id. at 12. Defendants further argued that the District Court found Ms. Edmo prevailed on the merits of her Eighth Amendment claim when it "concluded that Ms. Edmo was entitled to an injunction under both the permanent injunction and mandatory preliminary injunction standards" because "prevailing on the merits is a mandatory prerequisite to granting a permanent injunction." *Id.* at 73.

Defendants' opening brief reflects their own understanding of the District Court's December 13, 2018 Order as entirely consistent with the District Court's May 31, 2019 Order. Defendants contended that the District Court issued permanent injunctive relief and held a final trial on the merits, and addressed these issues at length. Not only does the principle of judicial estoppel prohibit Defendants from making new arguments that directly contradict their earlier positions on appeal, but Defendants also waived such arguments by failing to raise them in their opening or reply briefs. *See, e.g., Christian Legal Soc.*, 626 at 487; *Int'l Union of Bricklayers*, 752 at 1404. Moreover, as Plaintiff argued in her answering brief, Defendants also waived any argument on appeal that the District Court should not have held a final hearing on the merits by failing to raise this issue despite multiple invitations by the District Court to do so. *See* Dkt. 32-1 at 62-63; *see also D.A.R.E. Am. v. Rolling Stone Magazine, 270 F.3d 793, 793 (9th Cir. 2001)*; *Int'l Union of Bricklayers*, 752 F.2d at 1404.

III. Defendants' "Supplemental" Submissions Do Not Undermine the District Court's Order on Limited Remand

The documents Defendants submitted with their motion do not undermine or contradict the District Court's May 31, 2019 Order on limited remand from this Court. Rather, these records demonstrate the unremarkable fact that Plaintiff has ongoing claims for injunctive relief and damages that were not the subject of nor resolved by the October trial and the Court's December injunctive relief order. Plaintiff moved for a preliminary injunction on only three of her six legal claims,

and only with respect to certain portions of the injunctive relief she seeks. Plaintiff moved for expedited relief only as to injunctive relief, not as to damages, which is the remedy to which Defendants' demand for a jury trial applies. Plaintiff has claims for damages under all six of her legal causes of action, which will be determined in a future jury trial. Plaintiff also did not move for expedited decision as to some of her requested injunctive relief, including, for example, Plaintiff's request that the Court "enjoin[ ] Defendants to house Plaintiff at an institution consistent with her gender identity." Dkt. 92-2 at 62. Additionally, although Plaintiff had initially moved for expedited injunctive relief on her request that Defendants provide her access to gender-appropriate underwear, clothing, and commissary items, because Defendants implemented a new policy related to these issues on October 5, 2018—three business days prior to the start of the evidentiary hearing—Plaintiff withdrew this request for expedited injunctive relief and the Court accordingly stated it "w[ould] not address that relief at this time." EOR 045. Thus, Plaintiff has ongoing claims for permanent injunctive relief yet to be adjudicated in this case that are distinct from the injunctive relief for gender confirmation surgery ordered by the District Court in its December 13, 2018 Order.

In short, these documents show that there are claims for injunctive relief and damages that remain before the District Court; they do not show, as Defendants now contend for the first time, that the District Court must not have intended to grant Plaintiff permanent injunctive relief with respect to the limited claims at issue in the expedited proceeding.

CONCLUSION

Defendants' motion is an improper merits brief that contradicts their prior legal positions, abuses this Court's resources, and prejudices Plaintiff. Therefore, this Court should strike Defendants' brief and sanction Defendants for repeated abuses and violations of appellate procedure. The motion to supplement is also

superfluous given this Court's prior ruling that the district court record is already before this Court on appeal.

DATED: July 1, 2019

Respectfully submitted,
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