

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BOARD OF EDUCATION OF THE)
HIGHLAND LOCAL SCHOOL DISTRICT,)
)
PLAINTIFF,) CASE NO. 2:16-CV-524
)
)
vs.) SEPTEMBER 7, 2016
)
)
U.S. DEPARTMENT OF EDUCATION,)
et al.,) 3:00 P.M.
)
DEFENDANTS.)
)

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE
COLUMBUS, OHIO

APPEARANCES:

FOR THE PLAINTIFF:

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

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1 WEDNESDAY AFTERNOON SESSION

2 SEPTEMBER 7, 2016

3 - - -

4 THE COURT: Good afternoon. Would counsel please
5 identify themselves for the record beginning with counsel for
6 Plaintiff Board of Education of the Highland Local School
7 District.

8 MR. MCCALEB: Thank you, Your Honor. Gary McCaleb,
9 Ken Connelly and Jeanna Hallock are on the call for the
10 Plaintiff Board of Education. I also have Mr. Wardlow joining
11 us. He will be submitting a pro hac for the case shortly.

12 THE COURT: Is Mr. Burton on the call?

13 MR. BURTON: Yes, Your Honor.

14 THE COURT: Was Mr. McCaleb speaking for you, too?

15 MR. BURTON: Yes, Your Honor.

16 THE COURT: All right.

17 And counsel for the Defendant Department Of Education.

18 MR. AMDUR: Thank you, Your Honor. This is Spencer
19 Amdur representing the federal defendant, and also on the call
20 for us are Sheila Lieber and Ben Berwick.

21 THE COURT: And what's your name?

22 MR. AMDUR: Spencer Amdur.

23 THE COURT: All right.

24 And then counsel for third party plaintiff, the Does.

25 MR. WIKSTROM: Thank you, Your Honor. This is Derek

1 Wikstrom from Debevoise and Plimpton. With me on the call are
2 Jyo Hamid, Joe Weissman and Jennifer Mintz from Debevoise and
3 Plimpton, as well as John Harrison and Linda Gorczynski, and
4 Chris Stoll from NCLR.

5 THE COURT: All right. And Ms. Gorczynski is from
6 Hickman and Lowder; is that right?

7 MR. WIKSTROM: Ms. Gorczynski and Mr. Harrison are
8 both from Hickman and Lowder.

9 THE COURT: Then does that cover everyone? I know
10 that there are -- Mr. Markling, have you already been
11 identified?

12 MR. MARKLING: No, Your Honor. So this is Matt
13 Markling with Sean Koran and Patrick Vrobel on behalf of the
14 third party defendants.

15 THE COURT: And that's the Board the Education?

16 MR. MARKLING: Yes, Your Honor.

17 THE COURT: Now, is there anyone who has not been
18 identified?

19 All right.

20 Thank you for being so accommodating because I know this
21 was short notice. But when we initially scheduled this
22 preliminary injunction hearing which is scheduled for the 20th
23 of September, I was under the impression, quite frankly as is
24 typically the case, that it would be an evidentiary hearing.

25 But at the time, counsel advised that it would not be an

1 evidentiary hearing but an argument on the law because the
2 facts were not in dispute.

3 Since then, plaintiff has filed -- Plaintiff Board of
4 Education of the Highland Local School District, or Plaintiff
5 Highland, has filed papers which indicated to the Court that
6 there was a dispute in evidence. And so we're going to -- you
7 needed to present witnesses, which is typically the case in a
8 preliminary injunction hearing.

9 So given that we're on a tight time table, and given
10 that I start what may be a three- to four-week trial on
11 September the 26th, I wanted to get you on the phone, find out
12 what you anticipate will be necessary in terms of evidence and
13 witnesses, perhaps devise a plan for expedited discovery and to
14 tell you that I have blocked off from the afternoon of
15 September 20th through the end of week to complete this. And
16 since at least one party wants witnesses, you're going to have
17 your opportunity to have them.

18 Just a second. I have a criminal emergency matter that
19 will take no more than three to five minutes. So we're going
20 to -- we are in recess for three to five minutes. I apologize.
21 But it's criminal, and it takes priority and it was
22 un-voidable. So hold your horses, everyone.

23 (Short recess taken.)

24 THE COURT: I apologize. I'm back.

25 That's where we are. Mr. McCaleb, how many witnesses

1 would you anticipate having or needing, or how long would it --
2 answer that first and then tell me how much expedited discovery
3 you think you would need.

4 MR. MCCALEB: Thank you, Your Honor. We're looking at
5 about - at least an initial look - probably five witnesses
6 total. On discovery, I think that could be pretty abbreviated.
7 The primary thing we would be looking for is medical records on
8 Doe, and I would assume those are pretty much accessible to
9 transfer to us. So very limited written discovery. And we
10 think if medical records are to us in a week or so, I don't
11 think we need to go very far beyond that on the written
12 discovery.

13 THE COURT: Do you anticipate, Mr. McCaleb, calling
14 experts? Is that going to be the crux of your evidentiary
15 presentation?

16 MR. MCCALEB: Yes, Your Honor. In our memo that we
17 filed yesterday, we outlined on page 31 the primary evidentiary
18 issues. And they really do revolve around the psychological
19 aspects of Doe and how the school's treatment of Doe have
20 impacted the psychological condition. So we'd be looking at
21 certainly deposing their experts -- excuse me, examining their
22 expert. And I would presume they would want to examine our
23 expert.

24 The other factor that's in there we think is pretty
25 critical would be getting an independent medical exam of Doe to

1 confirm or dispute the diagnosis and information that's been
2 presented on Doe.

3 THE COURT: Mr. Berwick, are you speaking for the BOE?

4 MR. BERWICK: Actually, Mr. Amdur will be.

5 THE COURT: I'm sorry. Mr. Amdur.

6 MR. AMDUR: This is Spencer Amdur. Our position is
7 that for the Highland motion for preliminary injunction against
8 us, there should be no need for any evidentiary hearing. The
9 issues that the motion raises and that our opposition raises
10 are surely legal issues, the interpretation of a federal
11 statute and federal regulations.

12 At the July conference --

13 THE COURT: But Mr. McCaleb was talking about your --
14 or the preliminary injunction by the third party plaintiff. Is
15 that right, Mr. McCaleb?

16 MR. MCCALEB: Correct, Your Honor. We agree with the
17 federal defendants that there's no discovery or witnesses
18 necessary on -- in respect to the federal defendants.

19 THE COURT: Right.

20 MR. AMDUR: That's right. So, for our part, we were
21 not planning on putting on our own witnesses or conducting or
22 being subject to discovery because our understanding has been
23 that there are no evidentiary issues, as far as the PI against
24 us is concerned.

25 THE COURT: All right. So I need to talk with

1 Mr. Wikstrom; is that right?

2 Mr. Wikstrom, are you speaking for the third party
3 plaintiff?

4 MR. WIKSTROM: Yes, I am, Your Honor.

5 THE COURT: For your PI, how many witnesses do you
6 anticipate?

7 MR. WIKSTROM: Well, Your Honor, I've got to say we
8 had thought initially we could proceed with legal argument
9 initially because there are ways we believe Your Honor could
10 resolve this without addressing the factual disputes given the
11 point with which Highland agrees that constitutional violations
12 presumptively cause irreparable harm. And the fact issues that
13 Highland identifies on page 31 of their most recent brief all
14 go to the question of harm and its extent.

15 I'd add also that the harm issues on our PI and the
16 balancing of harms I believe are identical to the harm issues
17 on their PI. I'm a little confused as to how it's possible
18 that those issues don't require evidence on their motion but do
19 on our motion.

20 All that said, we would certainly call -- if we were to
21 go forward with an evidentiary hearing which we're ready and
22 willing to do, we would certainly call Joyce Doe. We would
23 certainly call Ms. Hill or someone who treated Jane Doe. We
24 would likely call Dr. Ehrensaft, the expert that we offered on
25 our motion, and we would consider whether or not to call Jane

1 Doe herself but I don't know that we reached a solid conclusion
2 on that yet.

3 THE COURT: All right. You're considering four --
4 maybe four or so witnesses if there is an evidentiary hearing.

5 MR. WIKSTROM: Yes, Your Honor. We would also
6 appreciate the opportunity to examine their witnesses to the
7 extent they went to disputed facts.

8 THE COURT: Oh, absolutely. We wouldn't have any
9 witnesses called who were not examined by the other side.

10 This is more a prophylactic approach because I haven't
11 decided whether it should be an evidentiary issue -- an
12 evidentiary hearing on your motion. But in the event that I
13 do, because of the time sensitivity of both motions, I don't
14 want to do it on the eve of the 20th when you won't have any
15 time to conduct discovery. I would rather err on the side of
16 you being prepared to go ahead with an evidentiary hearing on
17 the 20th and make temporal provisions for you, like the 20th
18 through the 23rd, because come the 26th I'm going to be pretty
19 much wrapped up in that trial, even though I typically will
20 take Fridays to address other matters on my docket. This has
21 such urgency that I wanted to get to this sooner rather than
22 later.

23 MR. WIKSTROM: Thank you, Your Honor. We appreciate
24 your attention to the urgency of this matter. We would be
25 happy to put in a letter -- we could do it overnight and put it

1 in tomorrow, if that would be helpful to the Court, to explain
2 why we think it may not be necessary to go ahead with an
3 evidentiary hearing prior to hearing legal argument, if that
4 would be helpful to the Court.

5 THE COURT: Yes, it would be helpful. If you would
6 file -- you could just call it a memo in opposition to an
7 evidentiary ruling because that's -- I'm sorry, a memo in
8 opposition to an evidentiary hearing because that's, in effect,
9 what it is, inasmuch as the plaintiff has suggested that
10 evidence would need to be taken on your preliminary injunction
11 because there was some disputed factual issues.

12 I'm not mischaracterizing your position, am I,
13 Mr. McCaleb?

14 MR. MCCALEB: I don't believe so, Your Honor. And
15 we'd certainly appreciate the opportunity to respond briefly to
16 that.

17 If I may, I believe they're proceeding under a theory in
18 which Doe is in fact a female in the genetic biological sense,
19 and that's why they take the position they do. We obviously
20 see that differently. And because of that, we feel the need to
21 bring in the experts, frankly get some depositions done
22 beforehand and get a good look at the records and also do that
23 independent examination.

24 So the other aspect --

25 THE COURT: Am I correct that your lawsuit does not go

1 to whether Ms. Doe is male or female? It goes to the
2 government's edict. Is that right?

3 MR. MCCALEB: It goes to the edict, but the effect of
4 that edict is to place Doe in the bathroom of the opposite sex,
5 and that's what creates our constitutional privacy violations.

6 THE COURT: Well, I want to be clear that we aren't
7 litigating the sexuality of Jane Doe.

8 MR. MCCALEB: Your Honor, we agree with that. That's
9 why we take the position, and the federal defendants take the
10 position, that no discovery is necessary. Doe is identified as
11 a male in birth records. That is the way Doe was treated early
12 in academic career. And again, from our perspective, it should
13 go off on a legal matter. When the interveners came in and
14 filed their MPI, we feel that does raise some factual issues.
15 And we don't want to litigate the sexuality of Doe. Doe is a
16 male by birth. We take the position, and our experts take the
17 position, you don't convert that by either external behavior or
18 by drug or surgical treatment.

19 The other aspect, too, is we don't see urgency in quite
20 the same way. We basically have a status quo. We have
21 credible reports that Doe is currently doing well in school.
22 There is a safety plan in place. I think the school has
23 responded very well. We are a little concerned about the issue
24 bought up of pronouns and some student-on-student issues.
25 We'll work with our client to ensure that the pronouns are used

1 in accord with those wishes and that any student-on-student
2 issue is promptly dealt with.

3 But the fundamental question of whether our school
4 district is going to be obligated to put a boy in a girl's
5 bathroom remains a very, very serious issue. And we do think
6 there's evidentiary needs if you are to consider and grant the
7 Doe's motion. Again, from the federal and board perspective,
8 we don't need discovery.

9 THE COURT: All right. Mr. Wikstrom.

10 MR. AMDUR: Just to clarify the federal defendants
11 position. We do agree that discovery isn't necessary to
12 resolve the legal issues in this case, but our position is Jane
13 Doe is a female. We do not agree with Highland on that count.

14 THE COURT: Mr. Wikstrom, did you have any response to
15 Mr. McCaleb?

16 MR. WIKSTROM: Yes, Your Honor. I would point out
17 first that I don't believe that we're disputing that my
18 client's birth certificate says she's male. And I'm surprised
19 to hear that Highland might be disputing that she's been
20 diagnosed with gender dysphoria given that on the very first
21 page of the brief they filed, they say that she's an
22 11-year-old biological male student who suffers from gender
23 dysphoria. It's a surprise to hear that's now a disputed fact.
24 I don't think those matters are in dispute.

25 THE COURT: Mr. McCaleb.

1 MR. MCCALEB: May I clarify? We're not disputing that
2 there's a diagnosis of gender dysphoria. We are disputing the
3 causal elements that underlie a number of the Doe claims. I
4 also think it illustrates the tension in this case when you
5 hear my opposing counsel say that a male is a she. They're
6 taking the position that he is a biological female because of a
7 psychological condition.

8 And again, the end point of that is you have an
9 anatomical biological male in the opposite sex's private
10 facility which does -- if you set the transgender issue
11 completely aside and nearly ask the question should a young boy
12 be in a private girls' facility, the answer would be no. That
13 would be a transparent Title IX violation, end of the question.

14 Now this transgender issue has come in which we see as
15 not being well-grounded in the best science, potentially even
16 dangerous to Doe -- I should add that we are extremely mindful
17 of the emotional impacts involved in this case on all of the
18 students. We want to do our very best to respect the privacy
19 and dignity of Doe, but there are serious questions of fact
20 underlying there, that if you're going to consider the Doe MPI,
21 we really should be providing the Court with the expert
22 testimony.

23 And I might add, because of the complexity of this, it
24 seems a little optimistic, dare I say, to think we could put
25 this together between now and the 20th. We're perfectly fine

1 on the legal matters. We're more prepped for that, but I think
2 both sides would benefit from the time to do discovery, some
3 depos and perhaps come in after your currently scheduled trial
4 on the 26th.

5 THE COURT: I guess one of the questions that your
6 comments raise, Mr. McCaleb, is, then, given your position in
7 the briefing that Jane Doe has been diagnosed with gender
8 dysphoria and you don't dispute that, then what do you
9 anticipate the evidentiary issues are, and what would you put
10 on witnesses to prove, Mr. McCaleb?

11 MR. MCCALEB: I think, Your Honor, the primary issue
12 for the Doe's motion is the causal element. As I take their
13 arguments in their brief, they center very heavily on the
14 notion that by treating Doe as other students are in his class
15 right now, which actually has access to individual facilities
16 is what the special needs class has, by maintaining that status
17 quo, they have said pretty strongly, I think, that Doe is at
18 significant risk of suicide and suffers other various
19 psychological harms. That's a causal question. I think some
20 of the assertions --

21 THE COURT: You mean whether Doe can use the female
22 bathroom and may commit -- I'm not sure that I'm following your
23 causal analysis. Could you elaborate on that some for me,
24 Mr. McCaleb? I'm sorry.

25 MR. MCCALEB: Yes, Your Honor. Thank you.

1 It's the question of whether these potential harms - and
2 opposing counsel is correct; this is very much a harm issue -
3 are truly and properly related to gender dysphoria. Doe has an
4 unfortunate combination of what the psychologists call
5 comorbidity. There's a number of other conditions that may be
6 weighing into this every bit as much as the gender dysphoria.
7 And it's not at all clear to us that simply -- I shouldn't say
8 simply -- but by putting every other students' privacy at risk
9 and allowing Doe to go into the girls bathroom would actually
10 resolve all these issues. So they have put on a number of
11 assertions as to the potential harm to Doe which we don't think
12 are credible. And the Court would benefit from hearing experts
13 on both sides, as well as some of the school personnel to speak
14 to how well Doe is doing right now.

15 So it really goes to the harms and whether granting Doe
16 access to the opposite sex bathroom would resolve this or
17 alternatively would he continue to be the very challenged and
18 complex individual that he is and continue to be at risk.

19 THE COURT: I see. I understand your position now.

20 Do you have any response, Mr. Wikstrom?

21 MR. WIKSTROM: Yes, Your Honor.

22 I think it's clear at this point that the factual
23 disputes go to harm. As I said, we believe that Your Honor may
24 be able to resolve this without having to resolve any disputed
25 factual issues that go to harm because of the way the law is in

1 the Sixth Circuit with respect to the presumption of harm in
2 the face of constitutional violations. And we will put a
3 letter in tomorrow explaining that position in more detail and
4 giving Your Honor some case law.

5 THE COURT: Mr. McCaleb, given that we should have
6 something filed by Mr. Wikstrom by close of business tomorrow
7 on the 8th, I would assume that you can get me a response by
8 close of business on the 12th?

9 MR. MCCALEB: Absolutely, Your Honor.

10 THE COURT: And what I will then attempt to do is to
11 have you -- to have an order on this by midweek, certainly not
12 later than Friday the 16th, but hopefully by the 14th, close of
13 business the 14th or the 15th, somewhere in there. But let's
14 just assume for the purpose of argument that if I agree with
15 you, Mr. McCaleb, that there should be some evidence taken on
16 these harm issues, then how long would you anticipate expedited
17 discovery would take? Emphasis on expedited.

18 MR. MCCALEB: With expedited discovery, Your Honor,
19 probably I would say three to four weeks. Obviously, we're
20 still sorting --

21 THE COURT: There must have been -- that was the first
22 time during our conversation where there must have been a
23 technical glitch because I said emphasis on expedited. You
24 could get general discovery on a PI done in four weeks. So
25 since I know you didn't hear me the first time, I'll repeat

1 myself. How long will it take you to do expedited discovery on
2 the three or four witnesses that you may need and that third
3 party plaintiff may need?

4 MR. MCCALEB: Having clearly heard expedited, Your
5 Honor, I'm assuming that the medical records would be very
6 readily available to us. I guess I'm thinking a little bit
7 about the discovery -- or excuse me, the deposition aspect of
8 this. The key thing to us are the medical records. The other
9 question is whether our expert psychiatrist could conduct an
10 independent medical exam. So a little bit of it is how quickly
11 the defendants can respond. Perhaps two weeks contingent on
12 availability, obviously.

13 THE COURT: All right. You see a problem with that,
14 Mr. Wikstrom?

15 MR. WIKSTROM: My concern is that's too slow. I don't
16 think that a medical examination is necessary. I will
17 certainly look into the speed with which we can review and get
18 medical records. But if Your Honor is going to take evidence,
19 we're happy to proceed September 20th through 23rd, and we will
20 do everything that we can in the interim to make sure that we
21 turn over whatever we need to turn over in order to make that
22 happen.

23 THE COURT: I want to hold us to that 20th to 23rd
24 date. Mr. McCaleb and Mr. Wikstrom, what I'd like for the two
25 of you to do -- and, Mr. Amdur, I don't mean to exclude you.

1 You may participate if you want, but I don't think it's totally
2 necessary.

3 But Mr. McCaleb and Mr. Wikstrom, I'd like for you all
4 to get together -- you don't have to physically get together,
5 but maybe talk after this conference call about what is
6 essentially necessary for expedited discovery with a
7 September 20th hearing date; or I can start as late as the
8 21st. So you all can determine how long it will take to get
9 the medical records. Jane Doe is not so old that she would
10 have so many medical records that getting them would be or
11 should be a problem. Indeed, somebody has these records
12 because it's the kind of case where someone would have probably
13 looked at some of these records at some point.

14 And I want the witnesses -- only the witnesses who need
15 to be called deposed. Any witnesses who might be called at
16 trial but not here, we don't need to depose them at this time.

17 So pretend, Mr. Wikstrom, that it's like a takeover or
18 something like that. I used to do those back in my practice
19 days a little over 20 years ago. And when it was expedited
20 discovery, it was expedited discovery and we got it done in a
21 week or so. So I'm sure that with the more narrow issues here,
22 we should get it done. The only problem might be the schedules
23 of some of the experts that Mr. McCaleb has referenced, or that
24 you, Mr. Wikstrom, might seek to use. But that aside, your
25 schedules shouldn't be a problem. So I don't see any reason

1 why we can't go on the 20th and go from the 20th till that
2 Friday or Saturday.

3 MR. MCCALEB: This is Mr. McCaleb, Your Honor. I
4 guess for the sake of efficiency, I'd very much like to see
5 what the Doe defendants are bringing forward in terms of legal
6 argument. May I suggest that I consult with opposing counsel
7 after he files that tomorrow? - because that might clarify
8 issues a bit.

9 THE COURT: Sure. I just want you all to talk before
10 the end of the week and come up with a plan. So that
11 doesn't -- if you -- I suppose if you could reach an agreement,
12 which I don't foresee, quite frankly, that may obviate the need
13 of you filing something on Monday. But that would be if you
14 all would reach an agreement as to whether there should be
15 evidence taken. You take the position that you need to put on
16 evidence. Mr. Wikstrom takes the position that it's
17 unnecessary. So I don't foresee that issue being resolved.

18 The issue that can be resolved, however, is how we can
19 get all of the discovery necessary completed in time for
20 hearing beginning either the afternoon of the 20th or the
21 morning of the 21st. I would much rather have you focus your
22 attention on something that we can actually get done.

23 MR. WIKSTROM: Thank you, Your Honor. This is Derek
24 Wikstrom. We'll do everything we can to make that schedule
25 work. And we'll put in a letter as soon as we can tomorrow, or

1 in any event by the close of business, explaining our position,
2 after which we'll speak with Mr. McCaleb and his team to talk
3 through how we can reach agreement on how we are going to
4 proceed in order to get to you by the 20th.

5 THE COURT: All right. And let's do it this way.
6 Mr. McCaleb, you will respond by close of business Monday. If
7 there are outstanding issues that go to scheduling of
8 discovery, then we can reconvene on the 13th with another
9 conference call to iron those things out. By that time, I'll
10 at least have some sense of what the briefing tells me.

11 So why don't we have a second conference call on Tuesday
12 the 13th, maybe at two. Well, wait a minute. I'm going to be
13 in trial. So let's say 12:45. I'll usually break from noon to
14 one for lunch. This shouldn't take any more than 15 minutes or
15 so to resolve. I'll move that to 12:30. And only Mr. McCaleb
16 and Mr. Wikstrom, someone from the government, Mr. Amdur or
17 Ms. Lieber or Mr. Berwick, one of the three of you -- certainly
18 Mr. McCaleb and Mr. Wikstrom, our 12:30 conference call on
19 Tuesday to resolve any outstanding issues on this expedited
20 discovery issue.

21 MR. WIKSTROM: Thank you, Your Honor.

22 THE COURT: Does that work for your schedule,
23 Mr. McCaleb?

24 MR. MCCALEB: Yes, Your Honor.

25 THE COURT: Mr. Wikstrom?

1 MR. WIKSTROM: Yes, sir. Thank you.

2 THE COURT: Okay. So, to the extent that you all can
3 reach an agreement, if you can, have one in place. In the
4 event that I decide that we're going to proceed with an
5 evidentiary issue, have a structure in place.

6 Are there any other matters that we need to take up at
7 this time from the plaintiff, Mr. McCaleb?

8 MR. MCCALEB: No, Your Honor. Thank you.

9 THE COURT: From the government, Mr. Amdur?

10 MR. AMDUR: No, Your Honor. Thank you.

11 THE COURT: And from the third party plaintiff,
12 Mr. Wikstrom?

13 MR. WIKSTROM: No, Your Honor. Thank you.

14 THE COURT: Thank you very much, everyone, for your
15 cooperation. I look forward to talking to you on Tuesday the
16 13th at 12:30. And I'll get out an order sometime today
17 capturing what we discussed.

18 Have a good day, everyone.

19 (Proceedings concluded at 3:51.)

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1 C E R T I F I C A T E

2
3 I, Shawna J. Evans, do hereby certify that the
4 foregoing is a true and correct transcript of the proceedings
5 before the Honorable Algenon L. Marbley, Judge, in the United
6 States District Court, Southern District of Ohio, Eastern
7 Division, on the date indicated, reported by me in shorthand
8 and transcribed by me or under my supervision.

9
10
11 s/Shawna J. Evans
12 Shawna J. Evans, RMR
13 Official Federal Court Reporter

14 September 9, 2016

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