

Case Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,
v.
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
(No. 1:17-cv-00151-BLW)

**DEFENDANTS-APPELLANTS' JOINT REPLY BRIEF IN SUPPORT OF
JOINT MOTION TO SUPPLEMENT THE RECORD ON APPEAL &
RESPONSE TO PLAINTIFF-APPELLEE'S REQUEST TO STRIKE AND
IMPOSE SANCTIONS**

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Defendants, by and through the undersigned attorneys of record, jointly request that this Court supplement the record on appeal with additional filings from the District Court that relate to whether the District Court conducted a final trial on the merits on October 10-12, 2018 and issued a permanent injunction. Defendants seek to supplement the record with documents that will appraise the Court of the status of the ongoing litigation in the District Court. These documents did not exist when Defendants filed their notice of appeal on January 11, 2019.

Under the Federal Rules of Appellate Procedure, the record on appeal consists of “the original papers and exhibits filed in the district court,” “the transcript of proceedings, if any,” and “a certified copy of the docket entries prepared by the district clerk.” Fed. R. App. P. 10(a). However, there is a lack of clarity as to how to apply this rule in the context of an interlocutory appeal such as this. The rule does not specify whether the record includes only those documents filed in the District Court before the notice of appeal was filed or whether the record on appeal is continuously and automatically supplemented with any subsequent filings and transcripts. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (suggesting that a document was not part of the record on appeal in part because it “post-dates not only the notice of appeal but even [the] opening brief on appeal”). As a result, Defendants appropriately seek to supplement the record on appeal with portions of the District Court record that were created after Defendants filed their notice of

appeal and that are relevant to the recent order issued by the District Court in response to this Court's limited remand (Dkt. 91).

Further, a party may present "questions as to the form and content of the record . . . to the court of appeals." Fed. R. App. P. 10(e)(3). Defendants have done just this and filed a motion with this court, identifying the new documents Defendants believe should become part of the record on appeal and explaining why the documents are relevant. Filing such a motion for supplementation at this juncture is particularly necessary in this case because the District Court has now issued a new order on limited remand from the Ninth Circuit and specifically held for the first time that the hearing on Plaintiff's Motion for Preliminary Injunction was a final trial on the merits.¹

From the beginning of this appeal, Defendants recognized that the underlying order was ambiguous regarding whether the District Court converted the preliminary injunction hearing to a final trial on the merits. Defendants argued, among other things, there was no clear and ambiguous notice of the District Court's intent to convert the proceedings and neither party considered the hearing a final trial on the merits. Consequently, Defendants argued in their opening brief that "the district

¹ Ms. Edmo argues that the District Court's scheduling order was included in the supplemental excerpts of record. To the extent including the scheduling order in the supplemental excerpts of record caused the scheduling order to become part of the record on appeal, Defendants concede that their request to add the scheduling order only to the record is moot. However, the other filings and transcripts were not included in the original or supplemental experts of record.

court erred *to the extent* it held a bench trial on the merits of Ms. Edmo's claims and the district court's decision should have no preclusive effect moving forward in this case." Dkt. 13-1 at 65 (emphasis added). In response, Ms. Edmo agreed that "the District Court did not 'convert[] the preliminary injunction hearing to a final trial on the merits'" Dkt. 32-1 at 28 (quoting Dkt. 13-1 at 61-65). According to Ms. Edmo, there was no error because "[t]he District Court's order is clear that it is an order for preliminary injunctive relief." *Id.* at 29.

After oral argument, this Court issued a limited remand for the District Court to clarify, in part, whether it had conducted a final trial on the merits and issued a permanent injunction. Dkt. 90. In response, the District Court stated in this new order that it had conducted a final trial on the merits regarding Ms. Edmo's Eighth Amendment claim for injunctive relief, found that Ms. Edmo succeed on her claim, and issued a permanent injunction. Dtk. 91. The District Court's May 31, 2019 order was certainly a surprise to Plaintiff and Defendants who had all agreed that the October 2018 hearing was not a final trial on the merits.

Rather than provide clarification, this new order has only provided additional confusion in the underlying action because the parties are continuing to litigate this case as if the District Court's October 2018 hearing and subsequent order did not have any preclusive effect. The filings and transcript that Defendants seek to add to the record on appeal are instructive in this regard; Defendants contend these documents show that the October 2018 hearing was not conducted as a final trial on

the merits and that the District Court did not enter a permanent injunction in issuing its December 13, 2018 order. Consequently, in the interest of justice, Defendants seek to provide the Court of Appeals with the information necessary to make an informed decision regarding whether the District Court conducted a final trial on the merits and entered a permanent injunction.

Ms. Edmo requests sanctions because Defendants did not file their motion to supplement until 19 days after the District Court issued its order. Dkt. 93 at 4-5. Ms. Edmo argues this was “an abuse of the appellate motions practice” because Defendants could have spent 19 days preparing their motion but Ms. Edmo had only 10 days to respond. *Id.* Ms. Edmo’s request for sanctions is meritless. First, Ms. Edmo fails to recognize that Defendants are merely attempting to provide the Ninth Circuit with additional information entered after the appeal was filed and which became relevant when the District Court entered its recent order that was inconsistent with the parties’ prior understandings. Second, Ms. Edmo cites no rule or law required Defendants to file the motion within a certain timeframe, and Ms. Edmo does not cite any legal authority for requesting sanctions. Third, Defendants needed time to review the record and transcripts in order to determine if the record should be supplemented in light of the District Court’s new order issued on limited remand. Fourth, if Ms. Edmo felt that 10 days was not adequate time to formulate a response, Ms. Edmo could have requested an extension from the Court. Fed. R. App.

P. 26(b). Thus, Defendants did not “abuse the appellate motions practice” and should not be sanctioned.

Ms. Edmo also requests that the Court sanction Defendants because Ms. Edmo claims Defendants are trying to file “a sur-response on the merits.” Dkt. 93 at 2. Not so. Defendants purposefully limited the length and substance of their motion to avoid any appearance of trying to introduce new substantive arguments. The brief on its face shows it was not a substantive motion on the merits. Defendants’ intent was merely to briefly explain why each of the documents was relevant to determining whether the District Court conducted a final trial on the merits of Ms. Edmo’s Eighth Amendment claim. Defendants simply seek to supplement the record with additional documents that post-date the notice of appeal and that help provide context to the this Court in direct response to a new order issued by the District Court. Prior to the District Court’s new order, neither party had treated the October 2018 hearing as a final trial on the merits and this Court was apparently uncertain on how the District Court had treated the hearing; hence, the limited remand. Accordingly, there is nothing nefarious regarding Defendants’ motion. Defendants are merely moving to supplement the record to provide context to this Court regarding how the District Court and the parties treated the October 2018 hearing and the subsequent underlying litigation.

In summary, based on the record before the court and Defendants’ briefing on this motion, Defendants respectfully request this Court grant Defendants’ Joint

Motion to Supplement the Record on Appeal and deny Plaintiff's related motion to strike and motion for sanctions.

This 8th day of July, 2019.

s/ Dylan A. Eaton

Dylan A. Eaton, ISB #7686

s/ Brady J. Hall

Brady J. Hall, ISB #7873

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS-APPELLANTS' REPLY BRIEF IN SUPPORT OF JOINT MOTION TO SUPPLEMENT THE RECORD ON APPEAL & RESPONSE TO PLAINTIFF-APPELLEE'S REQUEST TO STRIKE AND IMPOSE SANCTIONS by electronic filing on the date stated below to:

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