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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE EDMO,

Plaintiff,

v.

IDAHO DEPARTMENT OF
CORRECTION; HENRY ATENCIO, in his
official capacity; JEFF ZMUDA, in his
official capacity; AL RAMIREZ, in his
official capacity; HOWARD KEITH
YORDY, in his official and individual
capacities; CORIZON, INC.; SCOTT
ELIASON; MURRAY YOUNG; RICHARD
CRAIG; RONA SIEGERT; CATHERINE
WHINNERY; AND DOES 1-15;

Defendants.

CIVIL ACTION FILE

NO. 1:17-cv-151-BLW

**DEFENDANTS' JOINT BRIEF IN
CONNECTION WITH EVIDENTIARY
HEARING OF NOVEMBER 21, 2019**

COME NOW, Defendants, Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery, by and through their counsel of record, Parsons Behle & Latimer, and the Idaho Department of Correction, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert, by and through their counsel of record, Moore Elia Kraft & Hall, LLP (collectively referred to as “Defendants”), and submit this filing in response to this Court’s November 14, 2019 Order (Dkt. 251).

The inception of the most recent procedural maneuverings in this case came about by Plaintiff’s filing of a Motion to Modify the Stay with the Ninth Circuit requesting “This Court’s stay of the district court’s December 13, 2018 order is lifted for Ms. Edmo regarding all presurgical treatments and any related corollary appointments or consultations necessary for gender confirmation surgery.” (Dkt Entry 101-1, p. 18.) Primarily Plaintiff argued that “[a]t a minimum, the stay should be partially lifted to require Defendants to provide Ms. Edmo electrolysis and related treatments ordered by Dr. Stiller.” (Id., p. 11-12.) However, at the time of Plaintiff’s Motion to Modify, there was no evidence on the record before the district court or on appeal regarding what specific GCS surgery Plaintiff needs to undergo and what pre-surgical requirements such surgery entailed. (See record, generally.) Recognizing this, Plaintiff improperly tried to litigate the facts before the Ninth Circuit Court of Appeals and filed an undated letter, signed by the GCS surgeon’s staff, suggesting that complete hair removal was medically necessary before the GCS surgery. (Dkt Entry 101-2, p. 6.)

The Ninth Circuit granted “Plaintiff-Appellee’s motion (Dkt Entry No. 101) to partially lift the stay of the district court’s order requiring Defendants-Appellants to take all actions reasonably necessary to provide Plaintiff with gender confirmation surgery.” (Dkt. 220.) Further, the Ninth Circuit held that its “stay of the district court’s December 13, 2018 order is partially lifted so that

Plaintiff may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery.” (Id.) The Ninth Circuit appeared to wrongly presuppose that there was already evidence on the record regarding which specific surgery was medically necessary and what pre-surgical requirements were necessary for that surgery. The Ninth Circuit’s order did not directly address Plaintiff’s request for electrolysis. (Id.)

Without allowing due process to Defendants, on October 24, 2019, this Court then issued an Order Requiring Defendants to Provide All Pre-Surgical Treatments and Related Corollary Appointments or Consultations Necessary for Gender Confirmation Surgery. (Dkt. 225). Defendants timely filed a Notice of Appeal of this Order on October 31, 2019. (Dkt. 227.) Also, later the same day as the appeal, Defendants filed a Motion to Stay the Pre-Surgical Treatment Order with the district court. (Dkt. 228.) Defendants argued, among other things, the Court does not have jurisdiction to issue the pre-surgical order because it alters Defendants’ arguments already on appeal. (Id.) Additionally, among other things, Defendants noted they were not provided due process and, if they had been, they would have presented information to the Court that hair removal treatment is not medically necessary for Ms. Edmo under the Eighth Amendment because, in part, there are other adequate surgical options that do not require hair removal should the Court’s stay of the actual GCS surgery be lifted. (Id.)

On November 8, 2019, this Court issued an Order Denying Defendants’ Expedited Motion to Stay. (Dkt. 244) Nevertheless, it set an evidentiary hearing for November 21, 2019 with a very expedited briefing and litigation schedule for that hearing. (Id.)

On November 12, 2019, Plaintiff filed a Motion to Reconsider the Court’s November 8, 2019 Order. (Dkt. 249.) In this motion, Plaintiff’s claimed that this Court does not have jurisdiction to conduct the November 21, 2019 hearing. (Dkt. 249, p. 7.)

On November 13, 2019, Defendants filed an Objection to the Court's November 8th Order. In this objection, Defendants contended, as did Plaintiff in her Motion for Reconsideration, that the Court does not have jurisdiction to proceed with the November 21, 2019 evidentiary hearing. (Dkt. 250.)

Without waiving objections, arguments and defenses in this case, Defendants then provided the Court with a Second Declaration of Geoffrey Stiller, M.D., the GCS surgeon, stating, among other things: (1) there were at least three types of vaginoplasty options, (2) two of those options do not require permanent hair removal, and (3) the surgeon is letting Plaintiff choose which surgery option she wants and she has not decided to date. (Dkt. 250-1.)

Despite Defendants and Plaintiff agreeing this Court does not have jurisdiction to proceed with the November 21st evidentiary hearing, this Court issued an order denying Plaintiff's Motion for Reconsideration and continued to find that it is necessary for it to hold the expedited hearing on certain discrete issues. (Dkt. 251, pp. 8-9.)

On November 14, 2019, the Ninth Circuit issued an Order acknowledging receipt of appellants' emergency motion for a stay pending appeal and issuing a very expedited briefing schedule where Plaintiff-Appellee must respond by Noon Pacific Time on Monday, November 18, and then Defendants-Appellants can file an optional Reply by Noon Pacific Time on Tuesday, November 19. (Ninth Circuit Dkt.Entry 7.)

Significantly, at this time, there are no motions pending before the District Court related to pre-surgical treatment requirements. Defendants' Motion to Stay was denied by this Court. (Dkt. 244.) Further, Plaintiff's Motion for Reconsideration was denied. (Dkt. 251.) Accordingly, Defendants are not clear what issues they are required to address at the November 21st hearing and

are not clear what the Court is asking them to submit in advance of the hearing, especially since there are no current motions before the District Court and all other issues should be on appeal.

Despite both parties agreeing the Court does not have jurisdiction to conduct the November 21st hearing and no current motions are pending, the Court has indicated it wants to address certain discrete issues at the hearing to primarily determine if hair removal treatment is required for the colovaginoplasty and zero-depth genital removal procedure. (Dkt. 244, p. 18.) Without waiving objections, arguments and defenses in this case, Defendants have filed a Second Declaration of Geoffrey Stiller, M.D. (the GCS surgeon) that states there are at least three different and distinct vaginoplasty options: (1) zero-depth (the testicles and penis are removed, but no vagina is created; no permanent hair removal required prior to the surgery), (2) the penile inversion (the name of this procedure speaks for itself – it involves permanent hair removal prior to the surgery), and (3) colovaginoplasty (surgery involves using part of the colon to create the vagina; involves two separate surgeries about six months apart, and permanent hair removal is not required). (Dkt. 250-1.) Dr. Stiller's declaration also states that he is letting Edmo chose which surgery the patient wants and Ms. Edmo has not decided to date which surgery she wants. (Id.)

The Court has also indicated it wants to address at the hearing which vaginoplasty surgery is medically necessary to treat Ms. Edmo's Gender Dysphoria. (Dkt. 244, p. 18.) However, Defendants have contended all along that no surgery is medical necessary and such issues are still on appeal. Respectfully, again, this Court does not have jurisdiction to address these issues at this point. Further, Defendants simply are not in a position to make such arguments or present such evidence, which would be contrary to their arguments in this case and on appeal.

This Court has indicated that Defendants may file a motion requesting that the Court consider alternative means of remedying their established violation of the Plaintiff's Eighth

Amendment rights. (Dkt. 244.) However, this question assumes that Defendants violated Plaintiff's Eighth Amendment rights, which Defendants contest and which issues are on appeal. Therefore, Defendants do not plan to file such a motion.

Even if there were appropriate evidentiary issues for Defendants to address at the November 21st hearing, Defendants have not had time to prepare for such a hearing due to other filings in this case (including an appeal brief) and have not had time to retain or work with experts to address such questions. (See Objections filed by Defendants, p. 250.) Also, Defendants have not had sufficient time to prepare a response to Plaintiff's Motion for Reconsideration, but such is now denied and there does not appear to be briefing allowed for that motion.

Unless the evidentiary hearing is stayed, defense counsel plans to appear at the November 21st hearing and will try to address any questions or issues raised by this Court at that time. However, given the confusing procedural posture of this case¹, Defendants reserve all objections, arguments and defenses to issues that may come up at the November 21st hearing. Further, Defendants reserve the right to submit additional filings (briefs, affidavits or other evidentiary materials) for the hearing or any issues raised at the hearing.

DATED this 15th day of November, 2019.

PARSONS BEHLE & LATIMER

By: /s/ J. Kevin West

Dylan A. Eaton
J. Kevin West
Counsel for Defendants Corizon Inc.,
Scott Eliason, Murray Young, and
Catherine Whinnery

¹ This Court recognizes "this case is in an unusual posture." (Dkt. 251, p. 7.)
DEFENDANTS' JOINT BRIEF IN CONNECTION WITH EVIDENTIARY HEARING OF NOVEMBER 21, 2019

DATED this 15th day of November, 2019.

MOORE ELIA KRAFT & HALL, LLP

By: /s/ Brady J. Hall

Brady J. Hall

Counsel for Defendants Idaho Department of
Correction, Henry Atencio, Jeff Zmuda, Howard
Keith Yordy, Richard Craig, and Rona Siegert

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November, 2019, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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