

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF IDAHO

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4 ADREE EDMO (a/k/a MASON EDMO),) CASE NO. 1:17-cv-00151-BLW
))
5 Plaintiff,) **TELEPHONIC STATUS CONFERENCE**
))
6 vs.))
))
7 IDAHO DEPARTMENT OF))
CORRECTION; HENRY ATENCIO, in))
8 his official capacity; JEFF))
ZMUDA, in his official))
9 capacity; HOWARD KEITH YORDY,))
in his official and individual))
10 capacities; CORIZON, INC.;))
SCOTT ELIASON; MURRAY YOUNG;))
11 RICHARD CRAIG; RONA SIEGERT;))
CATHERINE WHINNERY; and DOES))
12 1-15,))
))
13 Defendants.))
_____))

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16 **TRANSCRIPT OF PROCEEDINGS**
BEFORE THE HONORABLE B. LYNN WINMILL
17 **WEDNESDAY, JANUARY 30, 2019, 3:30 P.M.**
BOISE, IDAHO

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21 Proceedings recorded by mechanical stenography, transcript
22 produced by computer.

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24 **TAMARA I. HOHENLEITNER, CSR 619, CRR**
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P R O C E E D I N G S

January 30, 2019

(Telephonic status conference.)

THE COURT: All right. Counsel, I think we have everyone on. We're on the record in this matter, but we're -- it is really just a status conference to kind of get things moving and addressed.

Let me deal first with the stay. The motion was filed by the defendants, and I believe the plaintiff's brief is due today.

Ms. Whelan or Ms. Ferguson, Mr. Durham, I assume that is filed or will be filed before the end of the day?

MS. WHELAN: That's correct, Your Honor. Just to apologize on behalf of Ms. Rifkin, she is actually in trial today, so she couldn't be with us.

THE COURT: All right. Then, I believe -- I should know this, certainly. I can't remember if the defendants have seven or ten days under our local rule to file a reply.

I assume, though, there will be a reply filed, Mr. Eaton or Ms. Crecelius?

MS. CRECELIUS: Yeah, Judge. This is Marisa Crecelius, and we would plan to file a reply.

I had talked to Dylan earlier today, and we filed our joint status conference earlier in the month. We asked the court to consider the stay on an expedited basis, but it appears

1 as though we will just go forward with the schedule as set forth
2 by the local rules.

3 THE COURT: Mr. Eaton, you agree?

4 MR. EATON: Yes, Your Honor. We would plan to file a
5 reply.

6 THE COURT: All right. Then we will just wait until
7 the reply brief is filed. If it's filed before the time
8 provided by our local rules, would you please notify Mr. Cole,
9 Kyle Cole, in my chambers so that we can address it as soon as
10 it's filed?

11 MS. CRECELIUS: Yeah, we can do that.

12 THE COURT: That's Ms. Crecelius?

13 MS. CRECELIUS: Yes.

14 THE COURT: All right, Counsel.

15 MR. EATON: Dylan Eaton, Your Honor.

16 THE COURT: Thank you for identifying yourselves to
17 make it easier on the court reporter.

18 Counsel, let me just address a practical concern. If
19 this case proceeds in the ordinary course, it will take 18
20 months to two years to get a decision from the Ninth Circuit.

21 Has counsel explored the possibility -- and I don't
22 know the answer to this -- whether there is a process by which
23 the circuit might hear a matter on an expedited basis,
24 particularly where it would be an appeal from a preliminary
25 injunction? Typically in those matters, time is of the essence,

1 and I would hope they might be willing to expedite the process.

2 Again, we have an evidentiary record that's developed,
3 a three-day trial. So there is going to need to be time for
4 that.

5 But has counsel thought of that? Because I am acutely
6 aware of the fact that if -- regardless of whether I grant a
7 stay or don't grant a stay, someone's ox is going to be gored by
8 this if no stay is granted, and assuming the circuit agrees with
9 me, although I think that's somewhat doubtful.

10 My experience has been that the circuit court does not
11 view matters with the same sense of urgency that the trial
12 courts do. But if -- if no stay is granted, then, obviously,
13 the legal issue will not have a chance to be addressed by the
14 appellate court until after it's essentially a fait accompli.

15 But the alternative is also true that if a stay is
16 granted, then the urgency which the court expressed in its
17 decision will have been disregarded, because it will take us the
18 aforesaid 18 months to two years to get a decision from the
19 circuit.

20 I would think, under those circumstances, there might
21 be some arrangement -- and I, frankly, took a quick look at the
22 Federal Rules of Appellate Procedure and also the Ninth Circuit
23 rules, and I just didn't have time to go through it in detail.

24 But is there any potential that this matter could be
25 heard on an expedited basis?

1 MS. WHELAN: I think --

2 THE COURT: You're cutting out. Who is that?

3 MS. WHELAN: This is Ms. Whelan. Can you hear me?

4 THE COURT: Yes.

5 MS. WHELAN: So the briefing schedule is currently
6 expedited in accordance with the Ninth Circuit's general
7 practice regarding preliminary injunction appeals. So right
8 now, the appellant brief is due on February 6th. The appellee
9 brief is due on March 6th. And the reply -- the optional reply
10 is due on March 27th.

11 But you are correct that there hasn't yet been an oral
12 argument scheduled; but I suspect that the Ninth Circuit would
13 likely also expedite an oral argument, as I think they have done
14 in other cases that are up on preliminary injunction appeals.

15 I'm not sure if that's helpful.

16 THE COURT: All right. Did you address that fact in
17 the -- in your response to the defendants' motion to stay?

18 MS. WHELAN: I believe there is a footnote that sets
19 forth the briefing schedule, yes.

20 THE COURT: All right. Well, I'll take a look at
21 that. Obviously, the defendants can -- in their reply brief,
22 can address what, if any, impact that expedited schedule would
23 have.

24 So, given that -- and I don't know if counsel has any
25 experience in that regard -- assuming that that occurs, might a

1 decision be issued within six months, or do we know?

2 MS. WHELAN: I have heard, Your Honor -- this is
3 Ms. Whelan again -- from other counsel anecdotally that
4 they -- it does not take the Ninth Circuit as much time to rule
5 on preliminary injunction appeals. But, of course, nobody has
6 control over that, so I'm not sure.

7 THE COURT: All right. Mr. Eaton or Ms. Crecelius, do
8 you have any take on that?

9 MR. EATON: This is Dylan Eaton. I just don't know,
10 Your Honor.

11 THE COURT: All right.

12 MS. CRECELIUS: Judge, this is Marisa Crecelius. And
13 I'm not sure of that, either.

14 I would like to let the court know that we have filed
15 a motion yesterday to extend the briefing schedule by 30 days.

16 And I wanted to bring it to the court's attention
17 today that the reason I am standing in Brady Hall's place is
18 because he had a medical emergency, was hospitalized, and still
19 really unsure about the cause of his medical emergency and when
20 he will be able to return to the office, if at all.

21 And so that will extend our briefing schedule, if it's
22 granted by the court, the Ninth Circuit, 30 days or, you know,
23 perhaps less than that, depending on what they rule.

24 THE COURT: All right. Well, that helps. I
25 appreciate it. I'll take that up.

1 And I raise it because it, obviously, might bear upon
2 the court's consideration of the motion to stay. I don't know
3 how it will bear, but I think it's something I would have to
4 consider.

5 All right. The next issue that I have, and it's
6 somewhat related to the question of the stay, my sense is that,
7 since this is, in essence, an interlocutory appeal, that I am
8 not deprived of jurisdiction and we can proceed with all other
9 aspects of the case while that appeal is pending.

10 But I could be wrong on that issue because it's not
11 something I address every day, so I don't have a ready answer.

12 So let me inquire of the plaintiffs whether you agree
13 with that or not. Ms. Whelan, Ms. Ferguson, Mr. Durham?

14 MS. WHELAN: That is also our understanding,
15 Your Honor.

16 THE COURT: Mr. Eaton?

17 MR. EATON: Your Honor, I wasn't prepared to address
18 that today. I haven't researched that issue, so I'm not sure I
19 can give an opinion today on that. It may be interlocutory, and
20 I think that was some discussion we had with the court
21 previously in our informal conference, but -- I don't mean to
22 punt, but I'm not prepared to admit that yet.

23 THE COURT: That's fine.

24 Ms. Crecelius?

25 MS. CRECELIUS: I'm in the same position as Dylan.

1 I'm not certain of what the case law or the rules are on that
2 particular issue, but I do recall discussing it before. And we
3 would certainly be happy to look into it in our reply brief if
4 that's an issue for the stay.

5 THE COURT: All right. Now, is -- my impression of
6 the motion to stay -- and I have only looked at the -- well, I
7 have read the defendant's, but I haven't done anything more than
8 that. But my understanding is you're only requesting a stay of
9 the court's order granting the injunctive relief and did not
10 request a general stay of all other proceedings.

11 Mr. Eaton, is that correct?

12 MR. EATON: Yes, Your Honor, I believe that is
13 correct.

14 THE COURT: Ms. Crecelius?

15 MS. CRECELIUS: Yes, Your Honor.

16 THE COURT: All right. That being the case, then I'm
17 going to assume that I have full jurisdiction. I don't need to
18 stay any other proceeding, including, I assume, the argument for
19 permanent injunctive relief and the claim for damages.

20 However, if I am mistaken -- actually, we will look at
21 that independently, but I think it is -- the burden is upon the
22 parties to raise that as an issue if you feel that I do not have
23 jurisdiction while the appeal is pending.

24 I'm fairly confident of that based upon past
25 experience, but I just have not specifically looked at that

1 issue.

2 So we're going to proceed. And that means, then,
3 we'll turn next to the -- what we used to call the case
4 management order; but I have been overruled, and now we are
5 supposed to call it, I think, a scheduling order, I think. I
6 prefer the word "case management order," but I was told that I'm
7 causing all kinds of problems in the district because everyone
8 else calls it something else. And we didn't want to confuse
9 anyone, so I think it's a scheduling order.

10 So we -- I have looked at the dates. I think there
11 is -- you know, I could make an argument this should be treated
12 as a standard-track case; and if it were only a suit for
13 damages, I probably would do so.

14 But because there may be some oddity coming back from
15 the circuit that may make the issue of permanent injunction a
16 more complex issue, I'm willing to go along with the deadlines
17 that you have put together in part because they don't really --
18 they are not that much more extensive than what we would have
19 for a standard-track case.

20 I think the critical thing for the court is the
21 dispositive motion cutoff, which I understand is a year from
22 now, and that discovery -- I'm trying to look. I have
23 forgotten, but I think the discovery cutoff is August 15th. And
24 expert witnesses, which obviously is a very important factor in
25 the case, would be all completed by December 31st.

1 So I'm okay with that. I will tell you that in most
2 cases, I try to strong-arm counsel to some extent to expedite
3 that. But since this case is driven so much by the court's
4 decision on injunctive relief, I think -- and particularly where
5 counsel is going to be involved in briefing and arguing that
6 simultaneously while they are doing discovery, I'm going to be
7 more flexible with counsel and just go along with those
8 deadlines.

9 I am assuming everyone is on board with that and no
10 one has had some buyer's remorse about the dates and schedule
11 that you have put together.

12 Is that true from the plaintiffs?

13 MS. CRECELIUS: That's correct, Your Honor.

14 THE COURT: From the defendants?

15 MR. EATON: This is Mr. Eaton. Yes, we stand by the
16 litigation and discovery deadlines.

17 THE COURT: Ms. Crecelius?

18 MS. CRECELIUS: Yes, Your Honor. We stand by the
19 discovery and litigation plan previously filed and stipulated
20 to.

21 THE COURT: All right. The other thing that I
22 do -- I'm wondering, given Mr. Hall's medical condition, if we
23 need to have another status conference fairly quickly just to
24 see what, if any, impact that may have upon the case.

25 I normally, in complex cases, have a monthly status

1 conference. In this case, I don't know that I need it that
2 often, but I might have another one in about 30 days, which, by
3 then, I will have made a decision on the stay and the -- we'll
4 have maybe a better sense of what Mr. Hall's medical condition
5 is and then take up whether or not there is a need to do any
6 tweaking of the scheduling order.

7 But after that, I'll probably have a conference every
8 two months because I just don't know that I need to have that
9 much interaction with counsel.

10 Does that make sense to counsel? Plaintiffs first.

11 MS. WHELAN: Yes, Your Honor, that makes sense.

12 THE COURT: Ms. Whelan?

13 MS. WHELAN: Yes.

14 THE COURT: Mr. Eaton?

15 MR. EATON: Yes, Your Honor, that makes sense.

16 THE COURT: Ms. Crecelius?

17 MS. CRECELIUS: Yes, Judge. We agree.

18 THE COURT: All right. We could possibly give you a
19 date now or maybe we will just issue --

20 Well, Ms. Bracke, do you have a date roughly 30 days
21 from now when we could do another telephonic status conference?

22 THE CLERK: March 5th at 4:00 p.m.

23 THE COURT: Counsel, does that work for all of you;
24 starting with the plaintiffs?

25 MS. WHELAN: I am just pulling up our calendar.

1 Sorry, Your Honor.

2 THE COURT: Again, it's telephonic, so there won't be
3 any travel involved.

4 MS. WHELAN: Yes, that works.

5 THE COURT: Just one moment, Counsel.

6 Mr. Eaton?

7 MR. EATON: Yes, I'm available March 5th at 4:00,
8 Your Honor.

9 THE COURT: Ms. Crecelius?

10 MS. CRECELIUS: I am available at that time as well,
11 Judge.

12 THE COURT: All right. Just so we're clear, I believe
13 I'm in trial in Coeur d'Alene that week --

14 Correct? We have got -- the time difference is okay,
15 Ms. Bracke? I should have known. She never makes mistakes.

16 All right. Counsel, the last thing that I'm aware of
17 is the Idaho -- Corizon, actually, report to the court about
18 progress made, or maybe it was a joint report towards complying
19 with the court's order.

20 I was personally satisfied with the steps taken.
21 There is no indication that there is any dragging of their feet
22 despite the fact that they are requesting a stay.

23 Let me ask of the plaintiffs: Ms. Whelan, do you have
24 any concerns about that?

25 MS. WHELAN: Yes, Your Honor. We would be interested

1 in hearing if there has been further progress. And also, we are
2 not familiar with that surgeon who they identified in the
3 report, Dr. Stiller.

4 And so we would request additional information as to
5 why they believe that he would be qualified to perform that and
6 whether or not they have taken additional steps to schedule
7 anything with him or with any other of the surgeons that we also
8 provided to them.

9 THE COURT: Mr. Eaton or Ms. Crecelius, can you
10 respond?

11 MR. EATON: Your Honor, this is Dylan Eaton.

12 As far as I understand, the surgeon they have
13 identified is qualified to perform the surgery at issue. We
14 could, obviously, provide an update on qualifications if that's
15 ordered by the court.

16 We understand that plaintiffs have submitted some
17 other considerations that are out of state, but we would hope
18 the court would understand that there are a lot of factors,
19 including security. To the extent that a qualified surgeon can
20 be more local, in Idaho, I think that's the preferred course.

21 I would note that I don't -- it's not my understanding
22 that plaintiffs necessarily get to dictate who the surgeon is,
23 but maybe I'm wrong on that.

24 And as far as any further updates, I am aware that
25 Corizon has a contract with an off-site medical provider,

1 Dr. Alviso; and Corizon and IDOC are continuing to work with
2 that doctor to coordinate the surgery.

3 It's my understanding that there is another
4 appointment sometime in February with that Dr. Alviso, and that
5 Dr. Alviso has talked with the surgical coordinator to create
6 a -- what I was told is the layout plan leading up to the
7 surgery.

8 So that's the additional information I have at this
9 point.

10 THE COURT: All right. Well, I certainly think it's
11 clear plaintiffs don't have the right to pick a doctor, but I do
12 think they have the right to insist upon a doctor who, in fact,
13 is qualified to perform the surgery.

14 And so I think you probably need to exchange
15 information. And I think -- Mr. Eaton, I think providing
16 information about the qualifications of the designated doctor
17 would be in order; and, likewise, for the plaintiffs to provide
18 information about other options and not just, I mean,
19 essentially, anyone who is qualified to provide the surgery on
20 the West Coast, and then allow Corizon to make its decision.

21 And I think it has -- Corizon has some interest in --
22 in fact, perhaps all things being equal, they might have an
23 incentive to use someone recommended by the plaintiffs just to
24 avoid legal issues that may arise, but I don't have that issue
25 before me.

1 But I would ask counsel to work together on that. If
2 it's an issue, you can notify Mr. Cole, and we can have another
3 interim conference in fairly short order.

4 My sense, though, is that the defendants are moving
5 towards compliance with the court's order, including the
6 schedule, and will continue to do so unless a stay is issued
7 either by myself or by the Ninth Circuit. I assume that's the
8 case.

9 Mr. Eaton, do you have that intention?

10 MR. EATON: Yes, Your Honor. That's our intention.

11 And I guess I should add that the Idaho Department of
12 Correction and Corizon have identified individuals to work
13 together to proceed toward the surgery as well.

14 THE COURT: All right. Ms. Whelan, are you content,
15 then, with that? Not content but --

16 MS. WHELAN: Yes, Your Honor, that process.

17 THE COURT: Okay. Yeah.

18 MS. WHELAN: If we have any trouble working together,
19 I like your suggestion of reaching out, but we certainly share
20 your opinion that hopefully we can just cooperate and exchange
21 information freely.

22 THE COURT: All right. All of this makes me think
23 that the defendants would be wise to file their reply brief on
24 the motion to stay, on an expedited basis.

25 And the reason I say that is: The sooner you get the

1 brief in, the sooner we can issue a decision. And if our
2 decision is to deny that request, the sooner you can put it
3 before the circuit and have them rule upon it, which, in turn,
4 would -- if it's ultimately granted -- and I'm not saying one
5 way or the other whether I would or whether the circuit would --
6 but if it is, it seems to me there is some benefit in doing that
7 sooner rather than later, simply because a substantial amount of
8 effort and cost is going to be incurred otherwise.

9 So I'm not going to shorten the deadlines. But it
10 does strike me, Mr. Eaton and Ms. Crecelius, that there would be
11 an incentive for you to expedite that and perhaps get something
12 filed within the week so that we can issue a ruling one way or
13 the other.

14 But, again, it's up to you. You have the right under
15 our local rules to take more time. And I personally -- it
16 doesn't affect me a great deal one way or the other, but it does
17 just seem to me it would be a good idea for you, but that's your
18 call.

19 All right. I think that covers everything that I can
20 think of.

21 From the plaintiffs, anything else we need to take up
22 here?

23 MS. WHELAN: Nothing more from us, Your Honor.

24 THE COURT: From Corizon, Mr. Eaton?

25 MR. EATON: Nothing else at this time, Your Honor.

1 Thank you.

2 THE COURT: From IDOC, Ms. Crecelius?

3 MS. CRECELIUS: No, Your Honor. That's it for us.

4 THE COURT: Okay. Well, I don't want to pry, but I do
5 hope everything goes well with Mr. Hall. I don't -- well, I
6 won't pry. I'll just leave it at that. We'll just see how that
7 shakes out.

8 It's -- it may have an impact on us. But much more
9 importantly, any impact on him is certainly -- I'm sure counsel
10 and other co-counsel and plaintiff's counsel would agree, we
11 certainly wish him the best and give him our regards.

12 All right?

13 MS. CRECELIUS: Thanks.

14 THE COURT: If there is nothing else, Counsel, we will
15 end the call. Thank you.

16 (Proceedings concluded at 3:55 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Tamara Hohenleitner, Federal Official Realtime Court Reporter, in and for the United States District Court for the District of Idaho, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 3rd day of June, 2019.

/S/ TAMARA I. HOHENLEITNER

TAMARA I. HOHENLEITNER, CSR NO. 619, CRR
FEDERAL OFFICIAL COURT REPORTER