Case No. 19-35917

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,
v.
CORIZON, INC., et al.,
Defendants-Appellants
and
IDAHO DEPARTMENT OF CORRECTIONS, 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' RESPONSE TO PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION AND REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY

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I. INTRODUCTION

Despite Ms. Edmo's unfair assertions to the contrary, Defendants do not seek to relitigate decided issues or to delay provision of any presurgical treatment actually deemed medically necessary. In reality, this Court's October 10, 2019 Order (DktEntry: 104, Case: 19-35017) partially lifting the stay unknowingly exposed an evidentiary void in the record that the district court has since attempted to fill hastily and without jurisdiction. This Court did not make any findings as to what presurgical treatments, if any, were "necessary." (*Id*). The district court had never made any such findings, let alone any findings as to what type of GCS surgery is medically necessary. (Dkt. No. 149) To date, Ms. Edmo's surgeon has identified three types of "medically acceptable" vaginoplasty procedures. (Dkt. No. 250-1, ¶ 5)

Yet, the district court, without authority of a limited remand and without providing Defendants an opportunity to present evidence, accepted as fact self-serving statements from Ms. Edmo's counsel as to medical necessity. (Dkt. No. 225) In doing so, the district court improperly modified its injunction by ordering permanent treatment for a specific vaginoplasty procedure that has neither been deemed medically necessary nor the only medically appropriate GCS. Further, the district court imminently intends to hold a hearing on November 2 that Ms. Edmo agrees will be done without jurisdiction. (Dkt. No. 249, fn. 1) Defendants appeal

challenges new decisions, and a stay must be granted so Defendants' appeal is not mooted by the district court's actions.

II. ANY JURISDCITIONAL CHALLENGES CAN BE ADDRESSED AT A LATER DATED.

This reply was ordered due 24 hours after Ms. Edmo's response. (Dkt. 7.) Defendants do not have sufficient time to fully address Ms. Edmo's Motion to Dismiss herein and will file a separate response within 10 days unless otherwise ordered by the Court. Fed. R. App. P. 27(a)(3).[1]

III. DEFENDANTS TIMELY RAISED AND HAVE NOT WAIVED OBJECTIONS TO GCS PRESURGICAL REQUIREMENTS.

Contrary to Plaintiff's representations, Defendants timely raised the GCS order being overboard and issues with presurgical requirements. On March 1, 2019, counsel for Corizon sent a letter to Plaintiff's counsel Lori Rifkin regarding update on status of steps being taken for Ms. Edmo's GCS surgery as ordered by the district court. (Dkt. 224-1, pp. 16-17.) This was based on information obtained at the time

[1] For now, Defendants note that Ms. Edmo applies the incorrect legal standard. The additional requirements Ms. Edmo cites apply only when the underlying order does not actually involve an injunction but has the practical effect of denying an injunction. *Shee Atika v. Sealaska Corp.*, 39 F.3d 247, 249 (9th Cir. 1994). The rule cited by Ms. Edmo "is simply irrelevant" when considering an order that "on its face" grants, modifies, or denies an injunction. *Id.* Similarly, This Court has jurisdiction to review an order that interprets or enforces the non-stayed portion of an injunction that has been partially stayed pending appeal. *State v. Trump,* 871 F.3d 646, 653 (9th Cir. 2017).

from the GCS surgeon's staff. The letter indicated that Defendants were working through the pre-surgical process and had set up an appointment with a GCS surgeon, Dr. Geoffrey Stiller. (*Id*., p. 17.) The letter indicated that based on the information known at that time, "typical" (not always) pre-surgical requirements often included hair removal. (Dkt 224-1, p. 17.) It was later learned from the GCS surgeon that there are at least three different vaginoplasty options, some of which do not require permanent hair removal. (Dkt. 250-1.) The letter also indicated that Defendants were working through the process "but completing all of these typical requirements is problematic in Ms. Edmo's case." (Id.)

While these presurgical issues were raised in defense counsel's letter to Plaintiff's counsel long ago, Plaintiff is still critical of Defendants for not raising it with the court before now. However, Plaintiff's criticism rings hollow because it fails to acknowledge that the Ninth Circuit, on March 20, 2019, agreed with Defendants that they did not need to proceed with the GCS surgery process at that time because it stayed, in its entirety, Judge Winmill's December 13, 2019 Order, including the GCS surgery pending appeal. (Dkt.Entry 19.) Indeed, with the exception of the Ninth Circuit slightly modifying this stay order only to allowing Ms. Edmo to attend an initial consult with the GCS surgeon on April 12, 2019 (Dkt.

187), a complete and full stay of the December 13, 2018 Order and Injunction has been in effect from March 20, 2019 through October 10, 2019 (almost 7 months).[2]

Plaintiff also improperly suggests that Defendants did not preserve objections to the presurgical issues now before the District Court and in this appeal. Plaintiff's representations are completely misguided and incorrect. On October 17, 2019, the District Court held a status conference regarding the partial lift of the stay to allow for medically necessary presurgical treatments. (Declaration of Lauri Rifkin, Exhibit A, 10/17/19 Status Conference Transcript (hereinafter "10/17 Tran".) At this status conference, Defense counsel timely raised numerous issues with the presurgical requirements that "relates directly to factual and legal issues in the case and some of which are on appeal." (10/17 Tran. 10:9-11.) Defense counsel argued, among other things, that the GCS surgery order as overbroad (Id. 10:13-20), that Plaintiff failed to establish which specific GCS surgery is medically necessary and what pre-surgical requirements were required (*Id*. 10:21-11-16), and noted that hair removal may not be required (*Id*. 11:10:23-11:16.). Defendants argued that the presurgical requirements were in violation of the Eighth Amendment. (*Id*. 11:4-7.)

The District Court jumped in and said "let me just cut you off …" (*Id*. 11:21-22.) The Court then asked Plaintiff to submit something from the GCS surgeon that

[2] Plaintiff did not move to modify the stay further for pre-surgical treatments for almost six months.

specified what presurgical steps needed to be taken and that the court "will, by essentially return mail, order that. Include that as part of the Court's order." (Id. 15:16-20.) No briefing schedule or hearing was set. No opportunity for Defendants to provide evidence or argument contrary to Plaintiff's filing was provided.

The Court then issued, on October 24, 2019, an Order, which included requiring permanent hair removal, reference letters to the GCS Surgeon, and payment approval for the surgery.[3] (Dkt. 225). This Order was based on a one-sided filing by Plaintiff that still failed to show which specific vaginoplasty was medically appropriate for Ms. Edmo and, aside from a penile inversion vaginoplasty, failed to address other vaginoplasties or presurgical requirements. (Dkt. 224-1, pp. 5-20.)

At a subsequent status conference on October 30, 2019, the District Court acknowledged, albeit after the fact, there were issues raised by Defendants about what the Court meant by "gender confirmation surgery", that "defendants are free to seek a - - some other resolution or even appeal", and that the Court was "certainly not suggesting that IDOC or Corizon have waived any objections on that issue" (Lori Rifkin Declaration, Exhibit B, 10/20/19 Hearing 4:24 – 5:10.) Contrary to Plaintiff's position, the issues regarding presurgical requirements raised have not been waived.

[3] The District Court has now indicated that payment approval for the surgery is conditional on the stay of the surgery being lifted and not currently required. (Lori Rifkin Declaration, Exhibit B, 10/30 Tran., 17:3-6.)

IV. DEFENDANTS HAVE SHOWN THAT A STAY IS WARRANTED.

A. Defendants Have "Made a Strong Showing They are Likely to Succeed on the Merits."

Defendants raise several "serious legal questions" on appeal, including whether the District Court's October 24, 2019 Order violates Defendant's Constitutional due process rights and amounts to a material modification of the injunction currently on appeal with the Ninth Circuit. Plaintiff suggests that the District Court is merely "supervising compliance", but the district court plainly intends to make additional findings of fact and issue orders that would materially alter the terms of the original injunction. Indeed, where the original injunction on appeal requires Defendants to provide "gender confirmation surgery," the District Court now seeks to make order a specific vaginoplasty procedure (i.e., penile inversion) as the only Constitutionally-sufficient procedure. Rendering the nearly totality of "gender confirmation surgeries" improper under the terms of the injunction could hardly be considered anything but a material alteration. All the while, the Ninth Circuit still considers whether Ms. Edmo is entitled to a gender confirmation surgery at all.

Defendants raise other serious questions on appeal, including whether the Modified Injunction is overbroad under the PLRA and whether the Constitution allows Ms. Edmo to select which procedure she prefers—it does not. In order to deflect the seriousness of these questions, Plaintiff suggests that Defendants are

relitigating prior issues and that this Court has heard "substantially similar arguments." However, each of the serious legal questions are new issues arising from the District Court's October 24, 2019 Order, related actions to make new findings of fact, and apparent intent to issue orders materially inconsistent with the plain language of the original injunction. Likewise, this Court has not yet had occasion to opine on the District Court's October 24, 2019 Order or its attempts to recast the underlying injunction without due process.[4]

B. Defendants Will be Irreparably Injured Absent a Stay Because Defendants' Appeal will be Mooted and Defendants Will be Deprived of Their Rights to Appeal.

A party is irreparably injured if the party's appeal becomes moot. *See Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). The District Court appears poised to proceed forward with a hearing for the purpose of making additional findings of fact, and, ultimately, order a specific vaginoplasty procedure. This would have the effect of mooting this appeal and the serious legal questions raised herein. That irreparable injury would result is the only conclusion that can be reached from unambiguous and binding precedent.

[4] "[T]he refusal to hear oral testimony at a preliminary injunction hearing is not an abuse of discretion **if the parties have a full opportunity to submit written testimony and to argue the matter**." *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1326 (9th Cir. 1994) (emphasis added).

C. Ms. Edmo Will Not be Substantially Injured if the Order is Stayed

It is telling that Ms. Edmo's strategy on establishing a "substantial injury" has shifted away from arguing that she would attempt-self castration if she is forced to wait. It is clear from the record that Ms. Edmo stopped threatening self-castration once she found out that doing so might impact her ability to receive a vaginoplasty. Instead, Plaintiff now submits a less tenable argument—that the stay is not warranted because of the pain and suffering that currently results from the lack of adequate pre-surgical treatment. True, if the stay is granted, no permanent pre-surgical GCS procedures would be provided until this Court determines Ms. Edmo is entitled to GCS. That being said, the possibility that Ms. Edmo might be forced to wait until the proper conclusion of a validly-brought legal appeal cannot constitute a "substantial injury." This lawsuit presents a novel, complex legal issue that remains unsettled and continually presents new factual, legal, and procedural issues to all parties involved. Ms. Edmo is not "substantially injured" by and through Defendants' lawful efforts to defend this matter, preserve legal defenses, and uphold their due process rights.

However, even if Ms. Edmo was properly alleging a substantial injury, that injury would not be redressed by denying the stay because the core of Ms. Edmo's case is that nothing short of "full GCS" would adequately remedy her ongoing pain and suffering. Moreover, two out of three vaginoplasty procedures do not require hair

removal prior to surgery, and, thus, providing electrolysis would do nothing to hasten the relief she seeks in the event she is ultimately determined to be entitled to a surgery.

D. The Public Interest Supports a Stay to Preserve Due Process and Allow this Court to Responsibly Fulfill its Appellate Role.

The purpose of a stay is to give the reviewing court the time to act responsibly and consider carefully its decision. *Leiva-Perez*, 640 F.3d at 967 (quoting Nken, 556 U.S. at 427). In this case, the above-presented questions and issues are important and will be rendered moot if the stay is not granted. It would be responsible for this Court, and the public's interest, to carefully consider those issues prior to the imposition of any further actions by the District Court that would permanently and materially affect the rights of the parties to this action. Likewise, the public has little to no interest in this Court denying the stay so that Ms. Edmo may receive hair removal treatments of questionable necessity for a surgery that she may not be entitled to. Ms. Edmo unartfully paints Defendants pursuance of this valid appeal as a refusal to follow the District Court's orders. In fact, Ms. Edmo can point to no instance wherein Defendants have actually failed to comply with any order issued by any court in this matter.

V. CONCLUSION

In summary, based on Defendants' Emergency Motion to Stay and the record before this Court and the District Court, the Ninth Circuit should stay the District Court's Order (Dkt. 225) and the related November 21, 2019 evidentiary hearing.

This 19th day of November, 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 electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 19, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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