

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

David Cohen v. Arizona Board of Regents

Cohen · No. CV-21-01178-PHX-GMS · Decided March 10, 2026

SUMMARY

The court addresses Plaintiff-Appellant David Cohen’s certificate asserting that trial transcripts were unnecessary for his appeal. It holds that Cohen failed to establish the transcripts were unnecessary because the trial record could bear on harmless error and overlapping factual and legal issues concerning his retaliation claim and summary-judgment appeal. The court orders Cohen to obtain the additional trial transcripts and requires the parties to share the costs equally, while denying Defendant’s request for oral argument.

CASE DETAILS

COURT	United States District Court for the District of Arizona
WRITING FOR THE COURT	G. Murray Snow
JURISDICTION	United States District Court for the District of Arizona
DECIDED	March 10, 2026
DOCKET	CV-21-01178-PHX-GMS
DISPOSITION	other
PROCEDURAL POSTURE	The district court ruled on Plaintiff-Appellant's Certificate of Non-Necessity of the Court Reporter's Trial Transcript in connection with his appeal from the judgment entered after a jury verdict for Defendant.
STANDARD OF REVIEW	The court applied the burden under Ninth Circuit Rule 10-3.1(f), requiring the appellant to establish that disputed transcript portions are unnecessary to the appeal.
PRECEDENTIAL VALUE	Unknown; district-court order with no stated precedential status.
PARTIES	David Cohen v. Arizona Board of Regents

TOPICS

- appellate procedure
- civil procedure
- qualified immunity
- summary judgment
- harmless error

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Cohen established under Ninth Circuit Rule 10-3.1(f) that the trial transcripts requested by the appellee were unnecessary to his appeal.
2. Whether the potential for affirmance on an alternative ground, including harmless error based on the jury's no-retaliation finding and overlapping facts and legal standards, made the trial transcripts necessary.
3. Whether the parties should evenly divide the costs of the additional trial transcripts.

HOLDINGS

1. The appellant bears the burden of establishing that disputed portions of the transcript are unnecessary, and Cohen failed to meet that burden.
2. The trial transcripts were necessary to the appeal because the jury's finding of no retaliation and the overlap between the trial claims and the claim against Anderson created substantial potential for arguments based on alternative grounds and harmless error.
3. Cohen must order the trial transcripts designated by the defendant, and the parties must evenly divide the costs.

KEY QUOTATIONS

“the Ninth Circuit may affirm a “district court’s grant of summary judgment . . . if it is supported by any ground in the record, whether or not the district court relied upon that ground.”” (at 3)

“Plaintiff has failed to establish that the trial transcripts are unnecessary.” (at 4)

“IT IS ORDERED that Plaintiff will order the trial transcripts designated in Defendant’s Rule 10-3.1(b) Response (Doc. 216-1 at 20) pursuant to Ninth Circuit Rule 10-3.1(d)-(e), and the parties shall evenly divide the costs.” (at 5)

FACTUAL BACKGROUND

The case proceeded to a seven-day jury trial, resulting in a defense verdict on Cohen's retaliation claim. Cohen appealed the judgment and several interlocutory orders, including the grant of summary judgment to Raymond Anderson on qualified-immunity grounds, but later stated that he would appeal only the summary-judgment dismissal. Cohen ordered transcripts from two motion hearings but not the trial, while the defendant argued that the trial transcript could bear on affirmance, harmless error, and overlapping factual and legal issues.

PROCEDURAL HISTORY

After a seven-day trial, the jury found that Cohen had not proven retaliation, and the court entered judgment for the Arizona Board of Regents on December 12, 2025. Cohen filed a notice of appeal identifying several orders, later narrowed his intended appeal to the summary-judgment dismissal of Raymond Anderson, and declined to order the trial transcripts. The defendant requested that the trial transcripts be included and offered to split their

cost. The district court held that Cohen failed to establish that the disputed transcripts were unnecessary and ordered him to obtain them, with the parties evenly dividing the costs.

DISPOSITION

other

CASES CITED

- Nat’l Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496, 500 (9th Cir. 1997)
- United States ex rel. Kelly v. Serco, Inc., 846 F.3d 325, 330 (9th Cir. 2017)
- Summers v. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997)
- United States v. \$25,000 U.S. Currency, 853 F.2d 1501, 1504 n.1 (9th Cir. 1988)
- Bruce v. United States, 759 F.2d 755, 758 (9th Cir. 1985)
- Tennison v. Circus Circus Enters., 244 F.3d 684, 691 (9th Cir. 2001)
- Wannamaker v. Mabus, No. 3:16-cv-00549, 2018 WL 2728016, at *2 (D. Idaho June 6, 2018)
- Hudock v. Aventis Pharm., Inc., No. CV-02-583, 2006 WL 1127373, at *1 (D. Ariz. Apr. 26, 2006)
- BNSF Ry. Co. v. Flies Away, No. 05-0386, 2007 WL 926912, at *1 (D. Ariz. Mar. 26, 2007)

OPINION

Cohen

PER CURIAM.

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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

8 9 David Cohen, No. CV-21-01178-PHX-GMS 10 Plaintiff, ORDER 11 v. 12 Arizona Board of Regents, 13 Defendant. 14 15 Pending before the Court is Plaintiff-Appellant David Cohen’s Certificate of Non- 16 Necessity of the Court Reporter’s Trial Transcript (Doc. 215). Pursuant to Ninth Circuit

17 Rule 10-3.1(f), this Court “shall determine which party shall pay for which portions of the 18 transcript.” For the reasons discussed below, the Court finds that Plaintiff must order the 19 trial transcripts, and the parties shall evenly divide the costs.

20 BACKGROUND & NINTH CIRCUIT RULE 10.3-1

21 On December 12, 2025, this Court entered judgment against Plaintiff (Doc. 207) 22 following a seven-day trial and a jury verdict in favor of Defendant-Appellee Arizona 23 Board of Regents (Doc. 206). The jury found that Plaintiff had not proven his claim for 24 retaliation against Defendant. (Id. at 2). On January 12, 2026, Plaintiff filed a Notice of 25 Appeal (Doc. 210) in which he indicated that he was appealing from the judgment (Doc. 26 207) and several of the Court’s orders (Docs. 23, 99, 115, 130, 177, 178). 27 On January 22, 2026, ten days after filing the Notice of Appeal, Plaintiff sent 28 Defendant’s counsel his “Initial Notice . . . pursuant to Ninth

Circuit Rule 10-3.1(a).” (Doc. 1 216-2 at 2). Under Rule 10-3.1(a), an appellant is required to serve any appellee “with a 2 notice specifying which portions of the transcript appellant intends to order from the court 3 reporter, as well as a statement of the issues the appellant intends to present on appeal.” 4 Appellants are required to do so “within [seven] days of filing the notice of appeal.” 9th 5 Cir. R. 10-3.1(a). Upon service of such notice, the appellee has seven days to “respond to 6 appellant’s initial notice by serving on appellant a list of any additional portions of the 7 transcript that appellee deems necessary to the appeal.” 9th Cir. R. 10-3.1(b). If the 8 appellee does identify additional portions of the transcript, the appellant must either (i) 9 order and pay for the additional portions; or (ii) certify to the district court that those 10 additional portions “are unnecessary to the appeal and explain[] why not.” 9th Cir. R. 10- 11 3.1(f). The appellant bears the burden of establishing that any disputed portions of the 12 transcript are unnecessary. *Wannamaker v. Mabus*, No. 3:16-cv-00549, 2018 WL 2728016, 13 at *2 (D. Idaho June 6, 2018); *Hudock v. Aventis Pharm., Inc.*, No. CV-02-583, 2006 WL 14 1127373, at *1 (D. Ariz. Apr. 26, 2006). 15 In his January 22 Notice, Plaintiff stated that he “intend[ed] to order full transcripts 16 from each hearing” for the orders he identified in his Notice of Appeal (Doc. 206 at 2) and 17 for “Civil Trial, beginning December 2, 2025 until Jury Verdict.” (Doc. 216-1 at 2). He 18 further identified ten issues that he intended to raise at appeal, three of which are relevant 19 here: 20 (2) The Court’s grant of summary judgment as to Appellee Raymond Anderson based on the parties’ briefing, 21 arguments, and burdens surrounding qualified immunity; 22 (3) The Court’s denial of Appellant’s Motion for Reconsideration related to the Court’s previous decision 23 granting summary judgment for Appellee Raymond Anderson; 24

(4) The Court’s denial of Appellant’s Motion for Certificate of Appealability/Motion to Sever related to Appellant’s 25 request for immediate appeal of the summary judgment grant in favor of Appellee Raymond Anderson; 26 27 (Id. at 2-3). 28 1 Four days later, on January 26, 2026, and before receiving any Rule 10-3.1(b) 2 response from Defendant, Plaintiff filed a transcript request, only ordering transcripts for 3 the Final Pretrial Conference and for two Motion Hearings. (Id. at 5). On January 27, 4 2026, Plaintiff’s counsel emailed Defendant’s counsel to “confirm that Plaintiff intends to 5 limit his appeal to the 1983 issue outlined in our January 2[2], 2026 Notice of Appeal 6 letter,” seemingly referring to the three issues referenced above. (Id. at 8). On January 28, 7 2026, Defense counsel requested “a clean Rule 10-3.1(a) letter that states plainly what 8 issues [Plaintiff] intends to present on appeal and which portions of the transcript [Plaintiff] 9 believes are necessary.” (Id. at 13). 10 Fifteen days later, on February 12, 2026, Plaintiff provided a second Rule 10-3.1(a) 11 Notice, which stated that “Plaintiff is no longer seeking to appeal any issues except the 12 dismissal of Raymond Anderson via summary judgment.” (Id. at 17). Plaintiff further 13 stated that his January 26, 2026 “transcript order only ha[d] orders related to that one 14 issue.”¹ (Id.). He identified the Motion Hearing transcripts as the “transcript for the initial

15 January 10, 2025 summary judgment hearing” and the “transcript from the June 2, 2025

16 hearing, during which the Court addressed Plaintiff's Motion for Certificate of 17 Appealability." (Id.). Plaintiff clarified that he "did not order the trial transcripts," because 18 he is of the opinion that "those transcripts have no bearing on the Court's Order granting 19 summary judgment in favor of Mr. Anderson." (Id.). 20 Defense counsel responded on February 13, 2026 with its Rule 10-3.1(b) response, 21 arguing that "the trial transcript . . . is also necessary to the appeal given the overlap 22 between the clarified issue on which [Plaintiff] intend[s] to appeal and the trial." (Id. at 23 20). Defense counsel further argued that the jury's "dispositive finding on retaliation . . . 24 is relevant to appellant's claims against Mr. Anderson and provides a basis for affirmance 25 of the district court's order on appeal." (Id.). Defense counsel later offered to "split the 26 cost of the trial transcript." (Id. at 22). 27 1 It remains unclear whether Plaintiff's reference to "that one issue" (Doc. 216-1 at 17) refers solely to the Court's order granting summary judgment in favor of Appellee 28 Anderson or if Plaintiff refers to the three issues quoted above from his initial Rule 10- 3.1(a) Notice.

1 ANALYSIS

2 Plaintiff fails to show that the disputed trial transcripts are unnecessary. In his 3 Reply, Plaintiff cites Ninth Circuit case law regarding appellate review of summary 4 judgment motions but attempts to apply standards governing parties' waiver to constrain 5 the appellate court's ability to review relevant information from the record. (See Doc. 217 6 at 2 (citing *Nat'l Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 500 (9th Cir. 1997))). 7 Contrary to Plaintiff's assertions, the Ninth Circuit may affirm a "district court's grant of 8 summary judgment . . . if it is supported by any ground in the record, whether or not the 9 district court relied upon that ground." *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 10 325, 330 (9th Cir. 2017) (quoting *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 11 (9th Cir. 1997)). In other words, the Ninth Circuit "may affirm the district court's correct 12 legal results even if they were reached for the wrong reasons." *United States v. \$25,000 13 U.S. Currency*, 853 F.2d 1501, 1504 n.1 (9th Cir. 1988) (citing *Bruce v. United States*, 759 14 F.2d 755, 758 (9th Cir. 1985)); see, e.g., *Tennison v. Circus Circus Enters.*, 244 F.3d 684, 15 691 (9th Cir. 2001) (affirming district court's grant of summary judgment where, even 16 assuming error, there was not reversible error). 17 Indeed, given the jury's finding of no retaliation and the overlap of legal and factual 18 issues between the claim Plaintiff intends to appeal and the claims that proceeded to trial, 19 there is substantial potential for arguments regarding harmless error on appeal. In his 20 Certificate, Plaintiff himself raises the merits of his First Amendment retaliation claim, 21 attempting to differentiate it from his claims that proceeded to trial. (Doc. 215 at 2-3). And 22 as this Court has previously held, these claims "rely entirely on the same set of facts." 23 (Doc. 130 at 6). If the Court of Appeals determines that this Court erred in its finding that 24 Appellee Anderson was entitled to qualified immunity at the summary judgment stage, it 25 will have to grapple with "the same set of facts" (id.) and substantially overlapping legal 26 standards. See *Tennison*, 244 F.3d at 691; compare Ninth Circuit Manual of Model 27 Criminal Jury Instructions § 9.9 & cmt. (2025 ed.) with (Doc. 199). 28 1

Finally, Plaintiff's alternate attempt to construe his issue on appeal narrowly, urging 2|| that the Court's order granting summary judgment in favor of Anderson focused solely on 3 || the second prong of qualified immunity, is also unsuccessful. He argues that the trial 4|| transcripts are irrelevant and unnecessary because they do not directly pertain to the legal 5 || questions relevant to that prong. (Doc. 217 at 2-3). But he neglects to argue that the trial 6 || transcripts are unnecessary as to any other arguments—such as harmless error—on which □□ Defendants may rely on appeal. \$25,000 U.S. Currency, 853 F.2d at 1504 n.1; BNSF Ry. || Co. v. Flies Away, No. 05-0386, 2007 WL 926912, at *1 (D. Ariz. Mar. 26, 2007) (noting || that “[a] party may decide to use the transcript to underscore or further explain its positions || throughout this litigation”). 11 Accordingly, Plaintiff has failed to establish that the trial transcripts are unnecessary. || Wannamaker, 2018 WL 2728016, at *2; Hudock, 2006 WL 1127373, at *1.

13 CONCLUSION

14 Given Plaintiff's failure to comply with the Circuit's procedure for ordering 15 || transcripts under Rule 10-3.1 and his failure to establish that the trial transcripts are 16 || unnecessary, Plaintiff will order the additional transcripts. The parties shall evenly divide the costs. Because the Court finds that the issues presented by Plaintiffs Certificate of 18 || Non-Necessity can be decided without oral argument, the Court denies Defendant's request (Doc. 218). 20 Accordingly, 21 IT IS ORDERED that Plaintiff will order the trial transcripts designated in || Defendant's Rule 10-3.1(b) Response (Doc. 216-1 at 20) pursuant to Ninth Circuit Rule 23 || 10-3.1(d)-(e), and the parties shall evenly divide the costs. The Court Reporter need not 24 || provide the transcripts until her costs have been fully paid. 25 IT IS FURTHER ORDERED that Defendant's Request for Brief Oral Argument 26 || (Doc. 218) is denied. Dated this 10th day of March, 2026. ¢ ~ G. Murray now Senior United States District Judge _5-