

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

OPINION

1 WO 2 3 4 5 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-