No. 24-6477

In the United States Court of Appeals
for the Fourth Circuit

KANAUTICA ZAYRE-BROWN,

Plaintiff-Appellee,

v.

NORTH CAROLINA DEPARTMENT OF ADULT CORRECTION, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of North Carolina

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

In an attempt to resuscitate the district court's summary judgment order and injunction, Plaintiff claims that the court made factual findings that do not appear in its summary judgment order or in its prior orders. Plaintiff also glosses over key evidence demonstrating a reasonable disagreement over the proper course of medical care and downplays the significance of this disagreement. Additionally, Plaintiff paints an inaccurate picture of a one-sided record that is belied by the actual evidence. Moreover, Plaintiff fails to wrestle with the fact that the DTARC's decision, which followed a detailed deliberation, cannot equate to a blanket ban. This is because this Court has never found, and should not find, a categorical ban on facts like these. Further, Plaintiff's prior grievances could not raise the issue of a purportedly flawed review process before that review even occurred. Additionally, Plaintiff does not adequately address the absence of the findings required by the PLRA to enter an injunction. Therefore, Defendants respectfully request reversal of the district court's summary judgment order and injunction.

ARGUMENT

I. The District Court Erred in Denying Summary Judgment to Defendants and Granting the Same to Plaintiff on Plaintiff's Deliberate Indifference Claim.

Plaintiff makes several arguments in support of the district court's decision on deliberate indifference. But none are compelling.

A. The district court's injunction does not apply the appropriate standard.

As argued in Defendants' opening brief, the district court did not and could not find that any Defendant acted with the requisite culpable state of mind. (*See* Doc. 22 at 36-37) In response, Plaintiff makes three arguments, but each fails.

First, Plaintiff argues that the district court appropriately applied the deliberate indifference standard because it "addressed Defendants' mental states directly in" a prior order. (Doc. 28 at 35-36) This argument is unavailing.

As an initial matter, the order Plaintiff references denied the parties' motions for summary judgment without prejudice and set an evidentiary hearing. (*See* JA0830-0831) The portion of the order cited by Plaintiff does not purport to make findings for purposes of deciding

summary judgment. Thus, that initial prehearing order cannot overcome the deficiencies in the district court's summary judgment order.

Nor does the prehearing order articulate the correct legal standard. The order reads: "No reasonable jury could find that Defendants lacked subjective awareness that denying Ms. Zayre-Brown's request carried *some* risk of harm." (JA0826) (emphasis added) But this is not the deliberate indifference standard.

The case law is well established. The subjective component of the deliberate indifference standard requires knowledge of a *substantial* risk of serious harm and the conscious disregard of the same. An official cannot be liable "unless the official knows of and disregards an *excessive* risk to inmate health or safety[.]" *Farmer v. Brennan,* 511 U.S. 825, 837 (1994) (emphasis added). "The official must both be aware of facts from which the inference could be drawn that a *substantial* risk of *serious* harm exists, and he must also draw the inference." *Id.* (emphasis added). Thus, knowledge of some generalized risk is not enough. *See Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014).

Additionally, when the district court entered its prehearing order, it had not yet heard evidence, so even if it were making findings for

purposes of deciding summary judgment (which does not appear to be the case), any such findings are not reviewed for clear error but rather are reviewed *de novo*. Under that standard, many of the district court's findings cannot be squared with the record. The district court stated that "Defendants knew the risks of denying Plaintiff's request for gender-affirming care[]" (JA0825), without stating what those risks were or referencing the evidence that indicates such knowledge.

This stands in contrast to the testimony of Drs. Peiper, Campbell, and Sheitman, who testified that they did not perceive Plaintiff to be at any particularly heightened risk without surgery. (JA0882-883, JA0888, JA0916, JA0947-0948; DE 61-5 at 85-88; DE 61-9 at 119-121; DE 61-12 at 9-11, 31, 87-90) The specific risks perceived by Defendants is critical because courts focus solely on the risks actually perceived by defendants and not risks that *should have* been perceived. *See Parrish v. Cleveland*, 372 F.3d 294, 303-04 (4th Cir. 2004). The uncontroverted testimony demonstrates that none of the DTARC clinicians considered Plaintiff to be at any significant risk of harm without surgery, thus the record cannot not support the necessary findings for the subjective prong.

Second, Plaintiff's argument that the district court appropriately addressed the subjective component (*see* Doc. 28 at 35-36), is an effort to rewrite the court's findings and conclusions. The district court granted Plaintiff's motion for summary judgment because it took issue with Dr. Campbell's involvement. (*See* JA1395-1396) The district court did not find for Plaintiff because Defendants were subjectively aware of a substantial risk of harm that they consciously disregarded. The record shows the opposite—Defendants specifically examined whether Plaintiff was at any particular risk without the surgery, and concluded she was not. (DE 61-5 at 78-82, 85-88; DE 61-9 at 119-121; DE 61-12 at 9-11, 31, 87-90; JA0880-0883, JA0888, JA0914-0917, JA0945-09480)

Third, Plaintiff makes a misleading argument about the Defendants' "current attitudes and conduct." (*See* Doc. 28 at 36) Here, Plaintiff relies on a portion of *Farmer* and incorrectly asserts that the district court found evidence of an intolerable risk of serious injury and that Defendants do not contest this finding. This argument misses the mark.

The cited section of *Farmer* reads, if "the evidence before a district court establishes that an inmate faces an objectively intolerable risk of

serious injury, the defendants could not plausibly persist in claiming lack of awareness[.]" *Id.* at 846 n.9. There, the Court clarified that under existing precedent a plaintiff did not have to await harm before seeking relief. *See id.* 511 U.S. at 845. Defendants have not contended that Plaintiff must actually experience "objectively, sufficiently serious" harm to succeed on her claim. Rather, Defendants have argued that the record does not show that Plaintiff faced a significant risk of substantial harm. (Doc. 22 at 13-18, DE 60 at 19-22) Thus, this part of *Farmer* is not applicable.

Additionally, Plaintiff does not cite, and cannot cite, anywhere that shows the district court concluding that there is an "intolerable risk of serious injury." Nor does Plaintiff cite any evidence that post-February 2022 (when the DTARC decided her request) she faced some increased risk of harm. And Dr. Ettner's report—which was based on an interaction with Plaintiff in May 2022—does not reference more recent indications of some worsening health condition. (DE 62-2 at 35-40)

For these reasons, Plaintiff's contention that the district court made the specific and necessary findings on Defendants' subjective mental states is incorrect and not supported by the record.

B. The district court erred in denying Defendants' motion for summary judgment because the record reflects a reasonable disagreement on medical necessity.

Plaintiff makes two arguments regarding reasonable disagreement—both are wrong.

First, Plaintiff argues that even if a jury found for Defendants on medical necessity, the trier of fact could still find for Plaintiff because Defendants' treatment was not adequate to address Plaintiff's serious medical needs. (Doc. 28 at 39) This is simply not correct.

As explained in their opening brief, Defendants determined that Plaintiff's requested surgery was not medically necessary because their review of her health records indicated that her mental health symptomology was well controlled by previous and current interventions. (*See* Doc. 22 at 13-18, 52-55) Thus, whether her current treatments were adequately addressing Plaintiff's gender dysphoria was part of Defendants' medical necessity analysis. Moreover, the district court specifically declined to decide the issue of medical necessity. (JA1397)

Plaintiff's second argument is that "the record has plenty of evidence that could persuade a factfinder that surgery is medically necessary for Plaintiff." (Doc. 28 at 39) But the fact that there is evidence

that favors Plaintiff on the issue of medical necessity is not dispositive on whether the district court erred in denying Defendants' motion for summary judgment. Indeed, the district court concluded that "taking the evidence in the light most favorable to either party, a reasonable jury could find for either party on the question of medical necessity." (JA1398) This acknowledgement demonstrates that the district court erred in denying summary judgment to Defendants because it underscores that there is a reasonable disagreement regarding medical necessity. (*See Hixson v. Moran*, 1 F.4th 297, 303 (4th Cir. 2021). Thus, Plaintiff's contention that the district court correctly denied Defendants' summary judgment based on the evidence of Plaintiff's medical need is flawed.

C. When accurately portrayed, the case law and the record do not support summary judgment for Plaintiff.

Whether relying on distinguishable cases or making unfounded assertions based on an inaccurate recasting of the record, Plaintiff's other arguments lack merit.

1. Plaintiff relies on distinguishable cases.

Plaintiff criticizes Defendants for "scarcely" mentioning *De'Lonta*. (Doc. 28 at 34) This is for good reason—*De'Lonta* is not instructive. The holding in *De'Lonta* is that allegations of a refusal to authorize an

evaluation for surgery, in light of knowledge of "overwhelming urges to self-castrate[,]" were sufficient to survive a motion to dismiss. *De'Lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013). This holding does not inform whether the Department's decision to deny Plaintiff's request for surgery after conducting a thorough review of her records and obtaining a surgical consultation constitutes deliberate indifference.

Additionally, citing *De'Lonta,* Plaintiff argues that "this Court held that when treatments other than surgery fall short, prison officials must evaluate a patient for gender-affirming surgery 'consistent with the [WPATH] Standards of Care.'" (Doc. 28 at 31) But WPATH does not articulate any particular manner of evaluating a surgery request. Rather, WPATH has a checklist of contraindications for surgery, and does not address whether surgery is in fact medically necessary or how to make that determination—for that, WPATH refers to the American Medical Association (AMA). (DE 104-3 at 18-19) Plaintiff's own expert Dr. Ettner conceded that WPATH does not answer the question of medical necessity in individual cases. (DE 104-7 at 106:20-107:1, 109:13-110:8)

Moreover, as Plaintiff correctly notes, "those standards" (the AMA standards) "require careful attention to the individual patient's needs." (Doc. 28 at 31). Indeed, this is what the DTARC did in thoroughly evaluating Plaintiff's entire medical history to assess whether her mental health symptoms warranted further intervention. (*See* Doc. 22 at 12-18; *see also* JA0881-0883; JA0888; JA0915-0917; JA0946-0950; JA0973-1379; DE 61-9 at 119 DE 61-12 at 9-11, 31, 87-90; DE 61-13 at 2; DE 61-27 at 2) That Plaintiff and her experts disagree with the DTARC's determination does not make their conclusion unconstitutional.

Plaintiff's reliance on *Gordon* is also misplaced. As noted in Defendants' opening brief, *Gordon* is not applicable to the instant case because it involved the application of a formal policy that did not permit the evaluation of the plaintiff and a whole group of other inmates for hepatitis C treatment. (*See* Doc. 22 at 46) Plaintiff does not make any arguments to counter that point. Nor does Plaintiff point to analogous cases where a court has found the application of an actual process to be such a farce as to amount to a "sham" process. Instead, Plaintiff simply asserts, without citing support, that Defendants imply that "a formal policy may be unconstitutional, while a sham *practice*—which will never

authorize treatment . . . is perfectly fine[.]" (Doc. 28 at 34) Defendants intend no such implication and rather assert that the cases relied upon by the district court are highly distinguishable because they involve formal bans—a point that Plaintiff does not attempt to counter.

2. Plaintiff makes unfounded assertions to paint an inaccurate picture of a one-sided record.

Plaintiff attempts to buttress her argument that the district court correctly applied the deliberate indifference standard with a series of unfounded assertions that distort the record. (*See* Doc. 28 at 36-40)

First, Plaintiff offers an inaccurate contention that Defendants ignored "handpicked specialists[,]" their "own employees[,]" and one of their own experts, who all concluded that surgery was medically necessary. (*See* Doc. 28 at 39-40) Presumably, Plaintiff is referring to Dr. Figler as Defendants' "handpicked specialist." If so, this claim is incorrect. The record demonstrates that the Department referred Plaintiff to the UNC Transhealth Program only for an evaluation of whether she would be an appropriate candidate for surgery, not to determine medical necessity. (DE 61-9 at 30-31, 36-37) Indeed, Dr. Figler's initial surgical consultation record does not make any determination of medical necessity. (DE 61-23) He only shared this

opinion in a declaration in support of Plaintiff's motion for summary judgment. (*See* JA0638-0642) Thus, Defendants did not ignore any information at the time of their determination.

Additionally, with respect to Dr. Caraccio, he was the endocrinologist who happened to be treating Plaintiff, and he offered his unsolicited opinion that surgery was medically necessary without articulating why or, more importantly, explaining how Plaintiff's symptomology or lack thereof factored into his analysis. (JA0653-0663; DE 61-26) Moreover, Jennifer Dula is a Licensed Clinical Social Worker (JA0704) and thus is not qualified to render medical opinions, and Katherine Croft is a registered nurse whose role appeared more in line with a care coordinator (JA0627-0634), who is also not qualified to offer opinions on medical necessity. The record does not reflect that any of these witnesses ever did (or could have done) a fulsome review of Plaintiff's health history, as the DTARC did. Nor does the record reflect that DTARC failed to consider these views.

Second, Plaintiff's contention that Dr. Boyd, one of Defendants' experts, testified that surgery was necessary to treat Plaintiff's gender dysphoria, is incorrect. Dr. Boyd's testimony was nuanced. (*See* Doc. 28

at 39-40) She testified that surgery would likely be a necessary component of treatment at some point in time; but Dr. Boyd further testified that when and in what context surgery would likely provide maximal psychological benefit was a different matter. (DE 65-12 at 53-54) Moreover, this contention omits one very critical conclusion of Dr. Boyd's report—that from a psychological standpoint, her evaluation of Plaintiff did not reveal significant findings that would counsel in favor of the surgery as an immediate intervention. (DE 65-1 at 34)

Third, Plaintiff claims that Defendants did not submit expert testimony to support their motion for summary judgment. (*See* Doc. 28 at 39) It is true that Defendants did not submit their experts' reports along with their opening summary judgment brief. But expert evidence is not critical to establish a reasonable disagreement, which was Defendants' primary argument on summary judgment. Additionally, Plaintiff ignores that Defendants offered their expert reports in opposition to Plaintiff's motion for summary judgment and referenced those reports in their reply brief. (DE 65-1, 65-10, 65-12, 65-13, 65-15, 65-16)

Fourth, Plaintiff points out that Defendants' experts did not testify at the evidentiary hearing. (*See* Doc. 28 at 39) This criticism is meritless.

The evidentiary hearing was limited to two specific topics that did not contemplate presentation of Defendants' experts. (JA0830) Indeed, the district court specifically admonished the parties that the court did not want a presentation of experts. (DE 104-7 at 1-5)

Finally, Plaintiff's attempt to paint Defendants' assessments on medical necessity as extreme outliers are unavailing. Defendants maintained that Dr. Campbell's position statement was rooted in his sincere belief based on his professional judgment, which is inconsistent with deliberate indifference. (*See* Doc. 22 at 37-42) In response, Plaintiff argues that under this view a doctor could "injury or even kill a patient through wildly incompetent care and avoid liability." (Doc. 28 at 36) Setting aside the hyperbole, Plaintiff's take on Dr. Campbell's position paper simply assumes that his professional judgment is so extreme as to render it unreasonable on its face. Importantly, however, the district court specifically avoided making any such determination. (JA1396) Moreover, Dr. Campbell's concerns about the medical literature are shared by Dr. Sheitman, and two of Defendants' experts, Dr. Penn, and Dr. Li, a world-renowned biostatistician who objectively analyzed more

than 80 studies relied upon by WPATH and Plaintiff's expert, Dr. Ettner. (*See* JA0951-0952; DE 65-13 at 33-34; DE 65-15 at 4-5, 11-25)

In response, Plaintiff argues that Drs. Penn and Li cannot support Defendants' position because she moved to disqualify Dr. Penn as an expert and because Dr. Li is not a clinician. (*See* Doc. 28 at 37-38) This argument fails as the district court has not excluded Defendants' experts (and indicated that it was not going to do so).[1]

Finally, Plaintiff incorrectly suggests that the case law has established that there can be no reasonable disagreement on medical necessity. (*See* Doc. 28 at 32) This is not an accurate assessment of the case law. To make this point, Plaintiff relies almost solely on *Edmo*. But *Edmo* did not set out any global pronouncements of medical necessity. Rather that decision was based on the specific record in that case. *See Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019). Plaintiff's argument also ignores several other decisions granting summary judgment in favor of prison officials on deliberate indifference claims, including one recently from a district court in this Circuit. (*See* DE 60 at

[1] Defendants have ordered the transcript of the most recent district court hearing, but it was not available before the filing of this brief.

27; Doc. 22 at 41). Accordingly, contrary to Plaintiff's contention, given the highly case-specific nature of these determinations, courts continue to acknowledge reasonable disagreement.

3. Plaintiff acknowledged that the district court's failure to determine medical necessity was flawed.

Plaintiff claims that Defendants are wrong "that the district court erred by finding an Eighth Amendment violation without" a medical necessity determination, in part because "the district court did not require Defendants to provide surgery—which would have required a medical necessity finding[.]" (Doc. 28 at 32-33) But as Defendants argued in their opening brief, without a medical necessity finding, the district court could not have found that Defendants knowingly disregarded an excessive risk of harm by denying the surgery. (*See* Doc. 22 at 36-37) Moreover, Plaintiff's brief appears to acknowledge that the absence of a medical necessity finding would be a problem if the district court had simply ordered surgery, with no alternative. Since surgery is the injunctive relief ultimately being sought (regardless of how Defendants initially proceed under the injunction), the lack of a medical necessity determination remains an issue.

Furthermore, on appeal Plaintiff attempts to defend the district court's injunction by arguing that the evidence supports the conclusion that the Department maintained a de facto blanket ban. (Doc. 28 at 32-34) Moreover, Plaintiff contends that the district court correctly reached this conclusion even without finding that the requested surgery was medically necessary. However, Plaintiff recently urged the district court to go ahead now, while the case is on appeal, and decide her medical necessity claim. (DE 129 at 1) This reflects Plaintiff's acknowledgement that the blanket ban claim alone cannot result in surgery, because it is necessary to determine medical necessity first. Hence why Plaintiff framed her claim as one for the denial of medically necessary treatment and only shifted to arguing a blanket ban after the district court suggested that theory.

4. Plaintiff cannot rewrite the order to avoid the reality that the district court was awarding relief for a procedural due process concern.

In response to Defendants' argument that the district court improperly converted the claim into a procedural due process claim, Plaintiff claims that the court "mainly took issue with the predestined *result* of Defendants' process, led by an inexperienced doctor who

believed, contrary to *De'Lonta* and the WPATH Standards, that surgery is 'never medically necessary to treat' gender dysphoria." (Doc. 28 at 33-34)

Here Plaintiff rewrites the district court's ruling. The district court did not rule in Plaintiff's favor because of a lack of experience by the members of the DTARC, or because of *De'Lonta*, or the dictates of WPATH. Instead, the district court stated that "Plaintiff's Eighth Amendment claim boils down to a single question: is Dr. Campbell's testimony credible?" (JA1395) The district court then concluded that Dr. Campbell's testimony was not credible based on his "authorship of the position statement, other DTARC members' deference to his medical judgment, and the DTARC's track record of denying" surgery requests by other prisoners. (JA1396) Thus, the involvement of Dr. Campbell in the process and the supposed deference of the other two clinicians to Dr. Campbell are the driving forces behind the district court's injunction. (JA1396) In short, the district court was entirely focused on purported procedural concerns that were not initially pressed by Plaintiff and improperly converted the claim to one Plaintiff did not and could not bring. (*See* Doc. 22 at 43)

5. Defendants have never waived their right to a trial by jury.

Relying on *Edmo*, Plaintiff argues that since Defendants participated in the evidentiary hearing without objection, they waived their right to a jury trial. (Doc. 28 at 40) This is not correct. *Edmo* is not controlling, but even if it were, it is distinguishable on this procedural point. In *Edmo* the Ninth Circuit concluded that defendants waived their right to a jury trial because they made no objection prior to participating in a permanent injunction hearing, which the district court noted "effectively converted these proceedings into a final trial on the merits." 935 F.3d 757, 775, 780. In the instant case, there has been no waiver of a right to a jury trial. Indeed, the district court's injunction specifically contemplates a jury trial on Plaintiff's ADA claim and her state constitutional claim. (*See* JA1398). Additionally, unlike in *Edmo*, here Defendants have consistently reiterated their demand for a jury trial, as recently as in their renewed motion summary judgment. (DE 111 at 1, 13).

D. Plaintiff's request was denied after a comprehensive review of her medical history and not because of a de facto categorical ban.

The district court concluded that Dr. Campbell's involvement in the review process rendered the Department's review so deficient that it amounted to a de facto ban. (*See* 1395-1396) Despite acknowledging that her claim was not premised on a categorical ban theory (*see* DE 66 at 21), Plaintiff now argues that the district court was correct in concluding that the Department failed to provide Plaintiff the meaningful, individualized consideration required by the Eighth Amendment. (*See* Doc. 28 at 29-35, 41-43) In making this argument, Plaintiff ignores the substantial evidence that demonstrates that the clinical Defendants specifically reviewed Plaintiff's health records and determined that her mental health symptoms were well controlled such that additional intervention (*i.e.* surgery) was unnecessary. Rather, Plaintiff focuses entirely on the position statement written by Dr. Campbell and the district court's speculation that the professional judgment reflected in that position statement so tainted the review process that it amounted to no review at all. But that speculation is not supported by the record.

1. The Department reviewed all of Plaintiff's health records and denied her request for surgery based on the clinical judgment of Drs. Peiper, Campbell, and Sheitman.

As set forth in Defendants' opening brief, in reaching the conclusion that the requested surgery was not medically necessary, the clinicians on the DTARC, Drs. Peiper, Campbell, and Sheitman, each independently reviewed Plaintiff's health records and assessed that Plaintiff's mental health symptomology was well controlled by existing interventions. (Doc. 22 at 12-18)

In her response brief, Plaintiff does not address this testimony or evidence. Plaintiff points to no record evidence that refutes the fact of the review or the actual conclusions that Drs. Peiper, Campbell, and Sheitman independently reached based on their review of Plaintiff's health records. Rather, Plaintiff points to opposite conclusions of other clinicians. (*See* Doc. 28 at 19-20) However, this reflects only a disagreement among clinical professionals—which, as a matter of law, is not sufficient to support a deliberate indifference claim, or at a minimum defeats Plaintiff's motion for summary judgment. *See Hixson*, 1 F.4th at 303. Thus, Plaintiff's argument that she was denied a "meaningful, individualized" review is not supported by the record.

2. Any conclusion that the Department applied a de facto categorical ban is clear error.

As argued in Defendants' opening brief, the bases for the district court's finding of a categorical ban were flawed and overlooked substantial and unrefuted evidence that the Department denied Plaintiff's request only after a thorough and individualized consideration of her request. (*See* Doc. 22 at 46-52) Plaintiff's attempts to argue to the contrary are unconvincing.

a. The district court did not make a finding that the Department applied a "sham process" in its prehearing order.

Plaintiff cites the district court's prehearing order and contends that "the district court found" that "Defendants violated the Eighth Amendment by imposing a functional ban on that treatment—'a sham process where the answer is always no.'" (Doc. 28 at 31-32) But reliance on this order to support the contention that the district court found that the Department maintained a categorical ban is misguided. The pertinent part of that order reads: "[the State] recognizes that gender reassignment surgery can be medically necessary in some cases. In determining medical necessity, it cannot then set up a sham process where the answer is always no." (JA0830) Importantly, the order

continued "After the evidentiary hearing, the [district court] will permit both sides to renew their summary judgment motions. The [district court] will then assess Plaintiff's likelihood of success on the merits and resolve her request for injunctive relief." (JA0831)

In that prehearing order, the district court did not make conclusions about what it found the State did or did not do. Instead, the district court spoke prospectively about what it believed the State could or could not do. Thus, contrary to Plaintiff's assertion, the district court did not state that it "found" that Defendants instituted a "sham process." (*Compare* Doc. 28 at 31-32 and JA0830-0831) Indeed, it is in that same order that the district court ordered an evidentiary hearing wherein one of the specific issues to be addressed was whether the Department had a categorical ban. (JA0830) Thus, Plaintiff's contention that the district court's prehearing order found that Defendants violated Plaintiff's rights by operation of a functional categorical ban plainly misunderstands that order.

b. The district court's bases for finding a de facto ban are flawed.

In its summary judgment order, the district court's finding of a de facto ban is based on two main points: (1) its conclusion that it could not

credit Dr. Campbell's testimony in light of the position paper; (2) its finding that others deferred to Dr. Campbell. (JA1396) However, reliance on either of these points to conclude that Dr. Campbell's involvement in the review so tainted the process so as to amount to a de facto ban is clear error.

First, Dr. Campbell's position paper reflects his professional judgment, and does not express any personal views. (JA0865-0876) This point is significant because the district court uses the position paper infer "bias" on Dr. Campbell, when the paper merely sets out his professional judgment.

Additionally, as explained in Defendants' opening brief (*see* Doc. 22 at 18-19), the key aspect of the professional judgment expressed by Dr. Campbell—that high-quality research in this area is lacking—is supported by the report and testimony of Defendants' expert, Dr. Li, as well as Dr. Penn, another defense expert, and shared by Dr. Sheitman. (*See* JA0951-0952; DE 65-13 at 33-34; DE 65-15 at 4-5, 11-25) Importantly, the district court did not take a position on the merits of Dr. Campbell's professional judgment. (JA1396) Without concluding that Dr. Campbell's position was unreasonable, the district court could not

reasonably infer that Dr. Campbell's professional judgment constitutes a "bias" such that his involvement in the review constituted deliberate indifference. Notably, Plaintiff cites no law to support such a conclusion. Ultimately, that Dr. Ettner or others disagree with Dr. Campbell's professional judgment does not render application of his judgment unconstitutional. Rather, this is yet another point of professional disagreement that demonstrates that Defendants were entitled to summary judgment, or at a minimum precludes summary judgment in favor of Plaintiff.

Lastly, the district court and Plaintiff incorrectly presumed that Dr. Campbell's position statement surely influenced the decision-making process surrounding Plaintiff's request. But this conclusion is contradicted by the record. As noted above, Drs. Peiper and Sheitman each independently reviewed Plaintiff's health records before the DTARC meeting and determined that surgery should be denied as unnecessary based on an assessment of Plaintiff's mental health. (Doc. 22 at 12-18) Additionally, each testified that they did not deny the surgery based on Dr. Campbell's assessment of the medical literature. (JA0887-0888, JA0950-0951) At the February hearing, Drs. Peiper and Sheitman each

testified (unequivocally) that they did not defer to anyone when they reviewed Plaintiff's medical records, but rather that they independently determined that her mental health was well-controlled, and that surgery was not indicated. (JA0883, JA0949) The district court wholly failed to address this testimony, and it made no finding questioning the credibility of these witnesses. In short, this record simply cannot support the conclusion that Dr. Campbell's professional judgment as reflected in the position paper swayed Drs. Sheitman or Peiper in a manner that made their own individual reviews or DTARC's review process more broadly a "sham process."

Plaintiff cites testimony about Dr. Peiper and Sheitman's so-called deference to Dr. Campbell (specifically JA0626, JA0734), but takes this

testimony out of context.[2] The cited testimony does not indicate in any way that either Dr. Peiper or Dr. Sheitman deferred to Dr. Campbell in reaching their conclusions that the procedure was not medically necessary for Plaintiff. Instead, at JA0734, Dr. Peiper testified that he did not personally review the medical literature and accepted Dr. Campbell's assessment. Significantly, however, Dr. Peiper testified that the state of the literature would not matter if his own assessment of Plaintiff's medical records indicated that her mental health symptoms were severe and not well controlled by existing interventions. (JA0888)

Regarding Dr. Sheitman's testimony, at JA0626, he said that he agreed with Dr. Campbell's recommendation that the surgery was not medically necessary and personally contributed to the recommendation

[2] Plaintiff's contention that the DTARC unanimously supported Dr. Campbell's position statement and deferred to him on medical necessity (*see* Doc. 28 at 17 citing JA0453, JA0926, JA0965-0966) is misleading. At JA0453, Dr. Campbell testified that other (unspecified) persons deferred to him as the medical authority. At JA926, Dr. Campbell testified that in March 2022, *after Plaintiff's request was reviewed and decided*, he sent a draft of the position statement to the DTARC members. And at JA0965-0967, when asked if "at some point the DTARC committee unanimously supported that position statement[,]" Dr. Sheitman testified that he "[did not] know[.]" (JA0967) Moreover, Dr. Sheitman further testified that when it became apparent that the position statement could be viewed as proposing a blanket ban, the paper was "shelved." (JA0967)

of denial. Elsewhere, Dr. Sheitman testified that he did his own review of the medical literature. (JA0951)

Additionally, Drs. Peiper and Sheitman each unequivocally testified that they did not defer to anyone, including Dr. Campbell, with regard to their own review of Plaintiff's health records and their assessment that her mental health was well-controlled by existing interventions. (JA0883, JA0949) Accordingly, the district court's finding that Dr. Campbell's "bias" and Drs. Sheitman and Peiper's "deference" amounted to a categorical ban on Plaintiff's requested surgery was clear error.

c. The record shows that the Department could and would approve gender-affirming surgery under certain conditions.

Plaintiff contends that "[a]n evaluation process that will never authorize medically indicated surgery, regardless of what a patient's treating clinicians find, shows indifference to a serious risk of harm that is forbidden by the Eighth Amendment." (Doc. 28 at 33) However, Plaintiff does not support this assertion with a citation to any evidence that Defendants would *never* authorize gender-affirming surgery. This is because the evidence shows the contrary.

Each DTARC clinician testified that gender-affirming surgery could be a necessary procedure if the patient presented with significant symptoms of gender dysphora that were impacting functioning and not responsive to previous or other interventions. (JA0887-0888, JA0923-0925, JA0950) Plaintiff does not address this evidence. Instead, Plaintiff relies on conjecture to contend that the Department maintained "a sham *practice*—which will never authorize treatment regardless of what a patient's treating clinicians say[.]" (Doc. 28 at 34) The district court also fails to meaningfully engage with the evidence on this point.

The record regarding the denial of other surgical requests is instructive. The district court and Plaintiff summarily note that the evidence shows that Department has denied all requests for gender-affirming surgery. (JA1396; Doc. 28 at 24) This is true. However, it is flawed logic to conclude from this that the DTARC would never approve surgery. As of December 2022, the DTARC had considered a total of 25 requests for gender-affirming surgeries made by only 15 people (not including Plaintiff). (JA0891-0892; JA0971-0972) Each of these requests received individualized review and consideration. (JA0892-0893; JA0971-0972) While some of the requests were determined to not be

medically necessary, several were denied for other reasons, including medical noncompliance, not well controlled and significant behavioral and mental health issues, not meeting diagnostic criteria, and more (JA0971-0972) Neither the district court nor Plaintiff address this evidence.

Furthermore, there is no evidence in the record that any of these surgeries were improperly denied in cases in which they were medically necessary. Indeed, there is insufficient evidence in the record of these other circumstances to draw any conclusions to that effect. Thus, any reliance on this evidence to support a conclusion that the Department would never authorize a request (contrary to sworn testimony by multiple witnesses) would be based on speculation and thus clear error.

Accordingly, any conclusion that the Department had and applied a categorical ban was clear error. At a minimum, whether the Department had and applied a categorical ban is a disputed issue of fact precluding summary judgment. Thus, this Court should remand for a jury trial to include that issue.

II. The Prison Litigation Reform Act Bars Plaintiff's Claim and Further Requires that the Injunction be Vacated.

As Defendants articulate in their opening brief, Plaintiff's claim that the process of reviewing her request for gender-affirming surgery violated her rights under the Eighth Amendment was not exhausted and thus is barred by the Prison Litigation Reform Act (PLRA). (*See* Doc. 22 at 57-62) Additionally, the district court's injunction should be vacated because it violates the requirements of the PLRA. (*See* Doc. 22 at 62-68)

In response to the exhaustion argument, Plaintiff contends that her previous grievances were sufficient to exhaust under the PLRA and that Defendants waived their exhaustion argument. (*See* Doc. 28 at 43-48) Plaintiff further argues that the injunction does not violate the PLRA because it is sufficiently narrow and, alternatively, that Defendants waived this argument. (*See* Doc. 28 at 49-56) Plaintiff's arguments are unconvincing.

A. Plaintiff did not exhaust her claim that the Department's review process was constitutionally deficient before filing this action.

Plaintiff's contention that this exhaustion issue is waived because Defendants failed include it in their motion to dismiss, raise it at

summary judgment, or list it as an issue presented (*see* Doc. 28 at 43), fails.

This exhaustion issue was not waived. Defendants raised the issue in their motion to dismiss (*see* DE 10 at 6) and as an affirmative defense in their answer (*see* DE 26 at 63) as it related to the claim that Plaintiff was then pursuing—deliberate indifference based on the denial of her request for surgery. As Plaintiff acknowledges in footnote 8, this was the theory of Eighth Amendment liability first advanced by Plaintiff (*see* Doc. 28 at 34), and it was not until the district court's prehearing order that Plaintiff changed her approach and focused on the present theory that the Department's process of review was so flawed that it amounted to no review at all—something Plaintiff unquestionably never exhausted. Thus, the opportunity to raise exhaustion only recently became apparent and Defendants raised it as soon as they could—in this appeal. If Plaintiff can switch theories of liability at the eleventh hour, surely Defendants are permitted to raise defenses that only became available as a result of Plaintiff's strategic switch.

Plaintiff's contention that her prior grievances were sufficient to exhaust under the PLRA (*see* Doc. 28 at 47) is equally unavailing. The

record is clear: Plaintiff's last grievance predated the DTARC's review of her request for surgery. (*See* JA0055-0056) It is impossible for previous grievances to address concerns regarding a review process that had not yet occurred.

Plaintiff is also wrong that she was not required to comply with the PLRA's strict and mandatory exhaustion requirement because of an ongoing wrong. Plaintiff never grieved the specific decision she now seeks to challenge, and any other ruling would encourage premature attempts to exhaust and run to federal court before decisions by prison systems have even been reached.

B. The injunction does not set forth the findings required by the PLRA.

Similar to the exhaustion argument, Plaintiff contends that Defendants waived this argument because they did not raise it in the district court. (*See* Doc. 28 at 48-49) This argument, too, lacks merit. Defendants challenged the injunction at the first opportunity—this appeal. Plaintiff cites no authority that requires a party to seek reconsideration or other modification from the district court before it may proceed with an appeal. Thus, Defendants' challenge to the scope of the injunction has not been waived.

In granting prospective relief, the PLRA requires the court to "find" that the relief is "necessary to correct a violation[,] . . . narrowly drawn[,] and is the least intrusive means necessary[.]" (18 USC § 3626(a)(1)(A)). As argued in Defendants' opening brief, the district court's injunction lacks these statutorily required findings. (*See* Doc. 22 at 62-63) Plaintiff's attempts to defend the injunction are unavailing.

Plaintiff argues that the injunction could not have been narrower because only removing Dr. Campbell from the process would remove only Dr. Campbell's "bias" but would not "address the other Defendants' minimal experience . . . or their acceptance of Dr. Campbell's opinions." (Doc. 28 at 53) But Dr. Campbell's supposed "bias" is the key driving force behind the district court's injunction. The district court did not find in favor of Plaintiff because it concluded that the clinical Defendants lacked the expertise to determine whether the surgery was medically necessary. Nor did the district court rule for Plaintiff because it concluded that the clinicians did not have an adequate grasp of WPATH. For those reasons, Plaintiff's contentions about Drs. Peiper and Sheitman's understanding and application of the WPATH guidelines (*see* Doc. 28 at 53-54) are not relevant. Moreover, as addressed above, the district court's conclusion

about the deference of others to Dr. Campbell was not supported by the record and constitutes clear error.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court reverse the district court's summary judgment order and vacate the injunction.

Respectfully submitted, this the 16th day of September, 2023.

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CERTIFICATE OF SERVICE

I certify that on this 16th day of September, 2024, I filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record

/s/ Orlando L. Rodriguez
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains less than 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface: 14-point Century Schoolbook font.

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