IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. RACHEL TUDOR et al.,	§	
	§	
Plaintiff-Appellant/ Cross-Appellee,	§	
	§	
v.	§	
	§	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY	§	Case No. 18-6102/ 18-6165
	§	
and	§	
	§	
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA	§	
	§	
Defendants-Appellees/ Cross-Appellants.	§	
	§	

DR. TUDOR'S OPPOSED MOTION FOR LEAVE TO FILE SURREPLY

Pursuant to Fed. R. App. P. 28.1(c)(5) Dr. Rachel Tudor respectfully moves for leave to file a surreply brief. Pursuant to 10th Circuit Rule 27.1, Tudor represents that this motion is opposed.

BACKGROUND

This case is a cross-appeal in which the parties have raised three issues each and separately filed appendices. On February 11, 2019, Tudor

filed the Third Brief and therein noted that Southeastern[1] had failed to include in its appendix hundreds of pages of the record that pertain to all three issues raised by its cross-appeal. Southeastern later sought and obtained leave of Court to supplement its appendix to correct those deficiencies. On March 4, 2019, Southeastern filed the Fourth Brief and eight additional appendix volumes. On March 11, 2019, Southeastern amended its appendix one last time, filing one volume under seal and another redacted volume on the public docket.

ARGUMENT

Dr. Tudor seeks leave to file a surreply for two reasons. First, Southeastern's Fourth Brief invites a surreply because it contains misstatements and distortions of law and fact. In particular, the Fourth Brief claims that Tudor's Third Brief misrepresented this Court's precedents and proceeds to distort those same precedents. The Fourth Brief also repeatedly misrepresents facts appearing in the record below, including materials Southeastern neglected to initially include in its original appendix, which the jury implicitly premised its verdict upon.

[1] Throughout this Motion Southeastern Oklahoma State University and the Regional University of Oklahoma are collectively referred to as "Southeastern."

The Fourth Brief even goes so far as to, in a footnote on the second to last page, accuse Tudor of having "lied" on the stand, a proposition it claims is proved by Southeastern's own misrepresentations of Tudor's testimony and trial exhibits.

In this situation, it is appropriate to permit Tudor a surreply so that she may reclaim the integrity of this process and otherwise ensure that if oral argument is granted the Court can focus on the merits of this case rather than distortions injected by Southeastern's Fourth Brief. *See, e.g.*, *Fleming v. Coulter*, 573 Fed.Appx. 765, 768 (10th Cir. 2014) (granting surreply where party's reply claimed opposing party misrepresented the record).

Second, Southeastern's Fourth Brief invites this Court to sit as a finder of fact on a variety of issues, including Tudor's sex. Tudor seeks the opportunity to present argument as to why this Court cannot sit as a finder of fact and to otherwise rebut the notion that Tudor's sex is anything other than female by pointing to evidence, including materials appearing in Southeatern's supplemented appendix, reflecting that she is female.

CONCLUSION

For the aforementioned reasons, Dr. Tudor respectfully requests that this Court accept for filing the 1,764 word surreply brief submitted concurrently herewith.

Dated: March 13, 2019

Respectfully submitted,

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I certify that on March 13, 2019, I electronically filed the foregoing Opposed Motion to File Surreply with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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Case No. 18-6102/ 18-6165

In the United States Court of Appeals for the Tenth Circuit

DR. RACHEL TUDOR,
Plaintiff-Appellant/Cross-Appellee

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
AND
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,
Defendants-Appellees/Cross-Appellants

On Appeal from the United States District Court for the Western District of Oklahoma, Case No. 5:15-cv-324-C, Hon. Robin Cauthron

PLAINTIFF-APPELLANT/CROSS-APPELLEE DR. RACHEL TUDOR'S SURREPLY (FIFTH BRIEF ON CROSS-APPEAL)

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GLOSSARY OF TERMS

Southeastern	Southeastern Oklahoma State University
RUSO	Regional University System of Oklahoma

SURREPLY ARGUMENT [1]

Appellate review affords an opportunity to correct errors below, not the option to retry one's case to a panel of judges. Southeastern's Fourth Brief wades dangerously into the territory of retrying its case rather than facing the strictures of appellate review head-on. In particular, the Fourth Brief skirts standards of review, lodges inappropriate and otherwise inept attacks on Dr. Tudor's credibility, and invites this Court to sit as a finder of fact. Dr. Tudor respectfully submits this Surreply to reclaim the integrity of this process and otherwise ensure that if oral argument is granted that this Court may focus on the merits of this case rather than the distortions injected by Southeastern's Fourth Brief.

I. SOUTHEASTERN FAILS TO CARRY ITS BURDENS ON CROSS-APPEAL.

Southeastern's appellate briefs skirt its burdens entirely. Southeastern failed to correctly advise this Court of the pertinent standard of review for issues raised on cross-appeal. Worse still

[1] Throughout Tudor references Southeastern and RUSO collectively as "Southeastern." Citation to the appendices will take this form: Tudor App. Vol. 1 at XX (Tudor's Appendix) or Okla. App. Vol. 1 at XX (Southeastern's Appendix). References to the parties' earlier filed briefs will take this form: 2d Brief (Southeastern's Opening Brief and Response), 3d Brief (Tudor's Reply/Response Brief), and 4th Brief (Southeastern's Reply Brief).

Southeastern misleadingly contends in its Fourth Brief that Tudor bears burdens that are actually borne by Southeastern.

For example, Southeastern claims it is entitled to a new trial on the premise that the District Court erroneously admitted Parker's expert testimony. Southeastern places heavy emphasis upon this Court's decision in *Adamscheck v. Am. Family Mut. Ins. Co.*,[2] claiming that case establishes that "the presumptive remedy is a new trial".[3] However, *Adamscheck* expressly recognizes that a new trial is not the presumptive remedy where the district court *included* rather than *excluded* expert testimony on issues for which the record reflects there was "independent, admissible evidence establishing the same proposition to which the expert testified."[4] To that latter point, the jury could have returned the same verdict based on other admitted evidence. For instance, copies of Southeastern's tenure rules[5] along with Tudor's 2009-10 and 2010-11 and

[2] 818 F.3d 576 (10th Cir. 2016).
[3] 4th Brief at 6 (*citing* 2d Brief at 28).
[4] 818 F.3d at 589 (*citing Storagecraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1089 (10th Cir. 2014) *and Kinser v. Gehl Co.*, 184 F.3d 1259, 1271–72 (10th Cir. 1999)).
[5] Okla. App. Vol. 3 at 588–91 (English Dep't tenure guidelines); *id.* at 594–640 (Policy 4.0—Faculty Personnel Policies).

portfolios of the four comparators,[6] all of which Parker evaluated and testified about extensively, were admitted into evidence.

Southeastern also invents other burdens and rules unsupported by caselaw or logic. For example, Southeastern claims it is Tudor's duty to point to the general acceptability of tenure experts and otherwise contends that the fact that a handful of district courts in other circuits have excluded tenure experts under different circumstances proves such experts are *per se* barred.[7] Not so.

The Supreme Court rejected "general acceptance" as a prerequisite to admission of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[8] Moreover, the untoward weight Southeastern places on *Goswami v. DePaul Univ.*'s call to bar tenure experts[9] is misplaced given that the Seventh Circuit, in which the Northern District of Illinois sits, implicitly rejected that invitation. As one example, in

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[6] Okla. App. Vol. 3 at 561–87 (reconstructed Tudor 2009-10 portfolio); *id.* at 749–804 (Spencer portfolio); *id.* at 815–844 (Cotter-Lynch portfolio part 1); Okla. App. Vol. 4 at 845–950 (Cotter-Lynch portfolio part 2); *id.* at 951–1136 (Tudor 2010-11 portfolio); Okla. App. Vol. 8 at 2035–329 (Parrish portfolio part 1); Okla. App. Vol. 9 at 2330–597 (Parrish portfolio part 2); Okla. App. Vol. 10 at 2598–770 (Barker portfolio).

[7] *See* 4th Brief at 8–9.

[8] 509 U.S. 579, 588 (1993).

[9] 4th Brief at 8–9, 13 (*citing Goswami*, 8 F.Supp.3d 1019 (N.D.Ill. 2014)).

Haynes v. Indiana Univ., the Seventh Circuit evaluates the admissibility of tenure experts in the same vein as other experience-based experts and makes no mention of a *per se* bar.[10]

Southeastern also manifestly ignores its burden in attacking the District Court's order striking Southeastern's untimely Rule 50(b) motion.[11] To overturn that decision on appeal Southeastern must show the District Court abused its discretion.[12] Rather than broach that burden, Southeastern quarrels with whether the District Court had the power to set deadlines.[13] It is unclear why Southeastern attacks the District Court in that manner given that district courts are generally empowered to manage their dockets and no rule or precedent bars shortening default deadlines for Rule 50(b) motions let alone enforcing them.[14] Moreover, Southeastern's retort in the Fourth Brief that it was justified in ignoring the District Court's special deadline on the logic that a traditionally "post-judgment motion [cannot] be due pre-judgment" is

[10] 902 F.3d 724, 732–33 (7th Cir. 2018) (Sykes, J.).
[11] *See* 2d Brief at 42–43 (arguing 50(b) motion was timely but neglecting to state standard of review); 4th Brief at 17–18 (similar).
[12] *See Quigley v. Rosenthal*, 427 F.3d 1232, 1237 (10th Cir. 2005).
[13] 4th Brief at 18–19; 2d Brief at 42–43.
[14] *See* 3d Brief at 30–33.

disingenuous.[15] The District Court also set a special prejudgment deadline for remittitur motions,[16] which are also traditionally entertained post-judgment, yet Southeastern did not ignore that deadline.

By a similar token, Southeastern attempts to evade this Court's precedents requiring that Rule 50(a) motions state the "specific grounds" supporting the movant's claimed entitlement to a directed verdict. Dubiously, Southeastern argues that *Wolfgang v. Mid-Am. Motorsports*[17] absolves its failure to articulate the specific grounds on which its Rule 50(a) motion rested on the record. Southeastern claims that "context is critical,"[18] but neglects to note that the critical "context" in *Wolfgang* concerns the fact that the movant identified specific grounds via a timely filed, written 50(a) motion and other grounds not included therein were deemed unpreserved[19].

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[15] 4th Brief at 19.
[16] *See* 1st Brief at 31 (pointing to ECF No. 287, the District Court's April 13, 2018 order, which set briefing deadlines for remittitur motions prior to entry of judgment).
[17] 111 F.3d 1515 (10th Cir. 1997).
[18] 4th Brief at 17 (emphasis in original).
[19] *Wolfgang*, 111 F.3d at 1521–22.

II. SOUTHEASTERN CANNOT DISTURB FACTS FOUND BELOW.

Southeastern's appeal proceeds as if four years of litigation has not happened. Indeed, Southeastern broaches facts found below in much the same manner as its burdens on appeal—it simply ignores inconvenient facts and argues, without legal support, that facts found and inferences drawn by the jury should be discarded entirely.

Southeastern's tack is best captured in the Fourth Brief. Ignoring this Court's precedents, Southeastern argues it can disturb the jury's findings by cherry-picking evidence it claims supports its own theory of the case.[20] That is not correct. The jury implicitly rejected Southeastern's theory of the case and declined to draw the inferences Southeastern urges on appeal. As held in *Ag. Servs. of Am., Inc. v. Nielsen*, this Court cannot ignore "necessary inferences from the verdict indicating that certain views of the evidence were *not* taken by the jury as they could not have rationally supported the result."[21]

One of Southeastern's attacks on the jury's findings merits further discussion. In a footnote on the second to last page of the Fourth Brief

[20] *See, e.g.*, 4th Brief at 16.
[21] 231 F.3d 726, 733 (10th Cir. 2000).

Southeastern claims Dr. Tudor "lied" on the stand, an assertion that is equal parts inappropriate and baseless. Critically, Southeastern ignores that the jury implicitly found Tudor to be a credible witness—that finding is not reviewable on appeal. As this Court held in *United Intern. Holdings, Inc. v. Wharf (Holdings) Ltd.*, the jury has the "exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching the ultimate conclusions of fact."[22]

Disturbingly, Southeastern's attack on Tudor's credibility is premised on distortions of Tudor's testimony and trial exhibits. Southeastern's contention that Tudor testified to the contents of the April 6, 2010 letter[23] at trial and lied about it is simply not true. The single page of the transcript Southeastern cites points to Tudor's general testimony about the meeting where the "offer" was extended and her recollection that she complained about aspects of the "offer" orally and in writing both at the meeting and later.[24] In that selection, Tudor did not purport to testify as to the contents of the April 6 letter verbatim—indeed

[22] 210 F.3d 1207, 1227 (10th Cir. 2000) (cleaned up).
[23] Tudor App. Vol. 5 at 226 (Tudor Ltr.).
[24] 4th Brief at 25 n.12 (*citing* Tudor App. Vol. 6 at 88).

that would have been odd since the letter itself was admitted into evidence. Moreover, Tudor clarified on cross-examination that her request that the offer be put in writing was made orally in the first instance and not raised in the April 6 letter.[25]

III. THIS COURT SHOULD REJECT SOUTHEASTERN'S INVITATION TO MAKE FACTUAL FINDINGS.

Southeastern also urges this Court to make new factual findings premised on bare argument of appellate counsel rather than evidence proffered below. Southeastern points to no legal standard governing such a challenge and fails to draw attention to evidence supporting its claimed facts. There is no legal basis for these kinds of eleventh-hour attacks. As held in *Schiller v. Moore*, even under *de novo review* it is inappropriate for an appellate court to make factual findings on appeal.[26]

As one example, Southeastern belatedly argues that Tudor's sex should be deemed as a fact to be "biologically male."[27] Southeastern does not point to evidence supporting such a finding. More troubling still, Southeastern ignores that the only evidence proffered below on this issue

[25] Tudor App. Vol. 6 at 151–56.
[26] 30 F.3d 1281, 1284 (10th Cir. 1994).
[27] 4th Brief at 13–14.

reflects that Tudor is female. For instance, Tudor testified that she is female.[28] Southeastern also ignores that the federal government recognizes Tudor as female as evidenced by the sex designation on her passport.[29] Southeastern also ignores the expert report from Dr. Brown wherein he concludes that it is the consensus of the scientific community that transgender women are biologically female, not male.[30]

CONCLUSION

For all of the foregoing reasons, Dr. Tudor respectfully renews her request for relief set forth in the First Brief.[31]

[28] *See, e.g.*, Tudor App. Vol. 6 at 202 ("I'm a woman.").
[29] Okla. App. Vol. 13 at 16.
[30] Tudor App. Vol. 1 at 204 (Brown Rep't).
[31] 1st Brief at 63–64.

Respectfully submitted this ___ day of March, 2019.

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I hereby certify that on the __ day of March, 2019, I electronically filed the Plaintiff-Appellant's/Cross-Appellee's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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