SILLY LAWYER TRICKS VII

By Tom Donlon

The latest column in our continuing series on real mistakes and misdeeds by real lawyers on appeal.

Walker v. Health Int'l Corp., No. 2015-1676, 2017 WL 65402 (Fed. Cir. Jan. 6, 2017).

Sometimes it is better to take your medicine and move on, rather than continuing a losing fight. In this case, the parties agreed to a settlement after mediation. However, when the defendant filed a motion to extend all filing deadlines for 30 days to effectuate that settlement, the plaintiff opposed the motion. There followed a flurry of filings over the next month, including plaintiff's motion to file an amended complaint and defendant's motion to enforce the settlement. Finally, the plaintiff executed a general release and defendant forwarded the settlement payment.

At that point, one would think the case was over. However, the plaintiff continued to submit filings, including an opposition to the motion to enforce the settlement that he had already been paid. Defendant eventually sought sanctions, which the district court granted, stating "Plaintiff's actions have unnecessarily multiplied the proceedings at a time when the underlying claims have admittedly been resolved." *Id.* at *2.

Plaintiff then made the poor tactical choice to appeal. Not only did the Federal Circuit affirm the sanctions, but added additional sanctions (more than double what the district court had awarded) for a frivolous appeal. The court of appeals noted that plaintiff had mischaracterized clear adverse authority and, when the defendant pointed that out, "he continued to press this frivolous argument and reiterated it at oral argument." *Id.* at *5. The court observed that plaintiff also raised new arguments on appeal and added, "[p]articularly troubling are [plaintiff's] baseless assertions of misconduct against his opposing counsel and continued misrepresentation of clear, binding Supreme Court precedent even after the distortion was pointed out by opposing counsel." *Id.* at *6.

The court noted that it "has long distained the filing of frivolous appeals" because it burdens overcrowded courts and "delays access to the courts of persons with truly deserving causes." *Id.* at *5. The court imposed sanctions of over $50,000, stating "[a]ttempts to mislead the court in a frivolous appeal further compound the wasted resources because the court and opposition are forced to devote extra resources to sorting through half-truths and misused legal authority in an appeal that never should have been filed in the first place." *Id.* at 6.

Making things worse for plaintiff-appellant's counsel, the court held him jointly liable for the sanctions award for misconduct in arguing the appeal as "we consider the attorney who wrote and signed the briefs to be equally responsible."

Id. at *6 (internal quotation marks omitted). Counsel's client was no better off after this appeal and counsel was definitely worse off personally.

Brown v. Rawson-Neal Psychiatric Hosp., 840 F.3d 1146 (9th Cir. 2016).

The appellant lost this case because counsel failed to argue the correct issue. The district court initially dismissed plaintiff's claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). That dismissal was without prejudice with leave to amend. Instead of amending, the plaintiff sought reconsideration. The court denied that motion, again with leave to amend. When plaintiff failed to timely amend, or respond to its order, the court dismissed the case with prejudice under Fed. R. Civ. P. 41(b) for failure to comply.

On appeal, the plaintiff sought review of the dismissal under Rule 12(b)(6), "ignoring the fact that the case was dismissed as a sanction under Rule 41(b)." *Id.* at 1148. The decision points out that the plaintiff-appellant not only failed to raise the Rule 41(b) issue, but did not even mention the order dismissing the claims with prejudice in the procedural history. The court stated that the "failure to mention in his opening brief the final Order of Dismissal under Rule 41(b) was either grossly negligent or disingenuous," and held that appellant waived the argument. *Id.*

Answering the dissenting judge, who argued that the court should exercise its discretion to hear the waived argument, the majority pointed out, "our case involves a civil appellant who tiptoed around a central issue in his opening brief.

Whether the omission was intentional or merely negligent, it was a significant error. *Id.* at 1149. The opinion stressed that "[r]ules are enforced to deter the type of improper, or inattentive, conduct that occurred here." *Id.* The requirement that parties clearly set out their arguments in their opening briefs assist the court's review, because "Judges are not like pigs, hunting for truffles buried in briefs." *Id.* (quoting *United States v. Dunkel*, 927 F.3d 955, 956 (7th Cir. 1991)). Unfortunately for this counsel, if the client is looking for a scapegoat to blame, he will not have to root around much to find the court's repeated references to negligence.

Hoffman v. Nordick Naturals, 837 F.3d 272 (3d Cir. 2016).

This case involves another attorney faced with a Rule 12(6)(b) dismissal without prejudice. He also chose not to file an amended complaint and paid the price—literally—on appeal.

The case involved a false advertising claim brought *pro se* by an attorney, who the court describes as "a serial *pro se* class action litigant." *Id.* at 274. Originally brought in New Jersey state court, the action was removed to federal court under the Class Action Fairness Act. After the district court dismissed the action, rather than file an amended complaint, plaintiff filed a new action in state court. The claims asserted were "virtually identical," except for changes in the

class size and definition, intended "it seems, to reduce the amount recoverable and therefore defeat federal jurisdiction." *Id.* at 276.

The defendant again removed the action and the district court again dismissed it; this time on a *res judicata* basis. Following affirmance by the Third Circuit, the defendant moved for sanctions as a frivolous appeal. The defendant pointed out that, while the district court had refused to impose sanctions for bringing the second state court action, the district court had observed that plaintiff was "playing a thinly veiled game of forum shopping by presenting claims that have been invalidated in federal court as a 'fresh complaint' in state court" and that "such tactics reek of gamesmanship and may warrant sanctions in the future." Failing to heed the district court's warning and proceeding with a frivolous appeal warranted sanctions, the defendant argued. The Third Circuit agreed and, in a separate unpublished order, imposed monetary sanctions and referred plaintiff attorney's conduct to the New Jersey attorney ethics office. As counsel was representing himself, he avoids the client relations issues that would ensue from such an order but is still stuck with the bill.

Parker Auto Body v. State Farm, No. 16-15470, slip op. (11th Cir. Dec. 6, 2016).

This case reminds everyone to read the local rules and follow them. Over thirty auto repair shops sued almost sixty insurance companies, claiming the insurers conspired to reduce repair cost reimbursements. The district court

dismissed the claims and the repair shops appealed. While the shops timely filed their appellate brief, they failed to file their appendix within the next seven days. The Eleventh Circuit immediately dismissed the appeal for want of prosecution.

The repair shops moved to reinstate the appeal, claiming that the circuit clerk's office told them they could file the appendix up to two weeks after their brief. The court rejected this argument and refused to reinstate the appeal. Advocates should keep in mind that courts tend to be protective of their clerks and do not look kindly on attempts to blame them for the lawyers mistakes. Here, a mistake in applying the court's rule on the time to file an appendix terminated a significant multi-party appeal.

Topsnik v. Comm'r, No. 151251, slip op. (D.C. Cir. Oct. 6, 2016).

A similar failure to follow the local rules almost derailed this case, too. The parties chose to utilize a deferred appendix under the Federal Rules. Once such an appendix is filed, the parties are to submit final briefs, changing the citations in their initial submissions from the original record to the appendix. The appellant, however, took the opportunity to rewrite his brief, adding new arguments and facts. As the D.C. Circuit's Order pointed out, "[a]ppellant's final brief does not merely add citations to the deferred appendix or correct typographical errors … but instead is a reorganized and rewritten combination of his initial briefs containing various new arguments." The appellee moved to strike the brief. Fortunately, the court

limited the relief granted to striking the improper version and allowed appellant to file proper conforming briefs within thirty days.

Cbeyond Commc'ns v. Sheahan, 840 F.3d 360 (7th Cir. 2016).

The underlying dispute here involved a small startup telephone/broadband service provider against AT&T. The parties had entered into an interconnection agreement that was approved by the state commerce commission in 2004. Eight years later, the small provider brought a complaint regarding certain terms in the agreement, which had increased its costs.

On appeal, the court found no violation of federal law, which specifically permitted such interconnection agreements. The opinion then turned to the question whether the court should consider related state law claims. The court's analysis of that issue is expressed in very pointed language. The court observed, "[i]t doesn't help Cbeyond's case that its briefs are virtually devoid of facts.… All we know is that Cbeyond made a contract with AT&T Illinois that it later regretted and has resorted to litigation in an effort to squirm out of the contract." *Id.* at 362-63.

In refusing to exercise supplemental jurisdiction over the state law claims, the court of appeals stated, "Cbeyond has imposed an excessive and unnecessary burden on the district court by bringing this sloppy lawsuit, and should not be permitted to impose further on the district court or our court." *Id.* at 363. While

counsel may have warned the client that certain judges on the Seventh Circuit are known for their blunt style, delivering the bad news of an appellate loss is certainly harder when the decision contains this kind of direct criticism.

Pinno v. Wachtendorf, 845 F.3d 328 (7th Cir. 2017).

Another example of the Seventh Circuit criticizing counsel in a blunt fashion occurred in this case. The state court had closed the courtroom during *voir dire* in the criminal trials of two particularly gruesome cases. The Wisconsin Supreme Court held that the defendants' counsels had waived any constitutional error by failure to object to the trial court's closing the courtroom.

On *habeas* appeal, the Seventh Circuit affirmed. The discussion of the merits of the appeal was fairly unremarkable—other than the details of the crimes, which included burning a victim's body, and drilling a hole in the ice to pour the ashes into a lake. At the end of the opinion, however, the court added a paragraph that castigated the attorneys for the length of the briefs submitted—over 200 pages. The decision stated: "There is no justification for such verbosity. These two consolidated cases are simple and straightforward. Our opinion is only seven pages long; and while such compression is not to be expected of the parties, they should have needed, and used" less than half the pages to present their arguments. *Id.* at 332. The opinion serves as a reminder that the page (and word) limits in briefs are a maximum and do not have to be met in every appeal.

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