No. 08-2457; No. 09-2615

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

THREE ANGELS BROADCASTING NETWORK, INC.,
an Illinois Non-Profit Corporation;
DANNY LEE SHELTON,

Plaintiffs-Appellees,

v.

GAILON ARTHUR JOY; ROBERT PICKLE,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 07-40098

DEFENDANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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PETITION FOR REHEARING *EN BANC*

The panel decision conflicts with decisions of the U.S. Supreme Court and of the 1st Circuit. *U.S. v. Miller*, 425 U.S. 435, 440–443 (1976); *Rowland v. California Men's Colony*, 506 U.S. 194, 201–02 (1993); *Jackson v. U.S.*, 156 F.3d 230, 234 (1st Cir. 1998). Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

The proceeding involves questions of exceptional importance, since it involves issues on which the panel decision conflicts with the decisions of other U.S. Courts of Appeals that have addressed these issues:

(a) Under Fed.R.Civ.P. 41(a)(2), may defendants be stripped of viable malicious prosecution claims without any justification?

(b) Must the position of defendants be protected from prejudice under Fed.R.Civ.P. 41(a)(2)?

(c) Must justification be given when denying curative dismissal conditions requested by defendants?

(d) May dismissal conditions be imposed upon defendants?

(e) May the district court eliminate material from the record on appeal?

(f) Must an imposition of costs, expenses, and fees under Fed.R.Civ.P. 41(a)(2) be restricted by 28 U.S.C. § 1920?

(g) Does payment of costs confer an ownership interest in discovery materials when there is no legal impediment to obtaining those materials?

(h) May Fed.R.Civ.P. 41(a)(2) be used to evade discovery deadlines?

PETITION FOR PANEL REHEARING

Defendants hereby petition this Court for a panel rehearing.

THE PANEL'S MAY 10, 2011, DECISION

> ... Having carefully reviewed the parties' submissions and the record, we conclude that there was no abuse of discretion in the district court's rulings, and we affirm the district court. Defendants' allegations of judicial bias are without merit. All pending motions, including the parties' motions for sanctions, are denied.

Affirmed. See 1st Cir. R. 27.0(c).

COMBINED ARGUMENT FOR PANEL REHEARING AND REHEARING *EN BANC*

I. 2nd Circuit Must Be Correct: "Some Justification" Required.

The underlying case was dismissed *without prejudice* (a) in order to deprive Defendants of "one of the elements of a malicious prosecution tort," and (b) (regarding Defendants pursuing their claims) so that the threat of facing Plaintiffs' claims yet again might "keep [Defendants] in check." (Record on Appeal Doc. # ("RA") 141 pp. 6, 8–9). But no justification for precluding Defendants' malicious prosecution claims was given.

By affirming the lower court's stripping Defendants of their viable malicious prosecution claims without any justification, the panel's decision conflicts with the 2nd Circuit. That circuit ruled that, in a voluntary dismissal, malicious prosecution claims "ought not to be precluded without some justification." *Camilli v. Grimes*,

436 F.3d 120, 124 (2d Cir. 2006).

Camilli must be correct: While the mere assertion of malicious prosecution claims cannot prevent a voluntary dismissal without prejudice, the purpose of Fed. R.Civ.P. 41(a)(2) is to protect the position of Defendants, not Plaintiffs. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976). The intentional deprivation of viable claims without justification only protects Plaintiffs, not Defendants.

II. 5th Circuit: Defendants Must Be Protected.

In opposing voluntary dismissal as to one or both Plaintiffs, Defendants explicitly requested specific curative conditions: (a) dismissal with prejudice, (b) "transfer of work product and discovery to future actions," and (c) "costs and fees pertaining to work product and discovery that cannot be so transferred." (RA 126 p. 19). Defendants also wished to preserve favorable rulings. (*Id.*).

Instead, the only "curative" condition imposed was one Defendants never requested[1]: Plaintiffs must refile their claims in the same court, which condition Plaintiffs understood to be non-binding if Defendants pursued their claims in state court because of a lack of diversity. (RA 141 pp. 10–11). Thus, Defendants were left with the duplicative expense of (a) having to litigate each and every discovery and protective order issue over again, and (b) acquiring expensive copies of records from MidCountry Bank ("MidCountry") ("MidCountry's records") a second time.

[1] Plaintiffs suggested this condition in the status conference, and, without giving opportunity to Defendants to comment on that proposed condition, Plaintiffs' motion was granted. (RA 141 pp. 10–11).

Reimbursement for the wasted expense was denied. (RA 166 pp. 3–4).

By affirming the lower court, the panel's decision conflicts with the 5th Circuit which requires that defendants be protected from prejudice when granting voluntary dismissals under Fed.R.Civ.P. 41(a)(2). *LeCompte*, 528 F.2d at 604–605.

III. 11th Circuit: Remanded Since No Justification for Denial of Requested Conditions Given in Record.

In *McCants*, the appellee filed a voluntary dismissal motion just three days before a scheduled hearing. The appellant's hastily prepared opposition requested dismissal conditions of costs and transfer of favorable rulings. *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 859–860 (11th Cir. 1986). The lower court granted a dismissal without prejudice, but never addressed appellant's requested conditions. Since the record provided no basis for determining (a) if the lower court had abused its discretion, (b) what litigation expense was wasted, and (c) what would be useful in future litigation, the 11th Circuit remanded the case for further proceedings. *McCants*, 781 F.2d at 860–861.

The underlying case is somewhat analogous: Plaintiffs filed their motion seven days before a status conference. (RA 120; RA 141). Defendants' hastily-prepared opposition requested specific conditions (RA 126 p. 19) which, Defendants contend, were never considered. Why weren't discovery and favorable rulings made transferable to future actions if Defendants must pursue their claims in state court? The record does not say. (RA 141).

The panel summarily affirmed the lower court, thus putting its handling of the instant appeals in conflict with the 11th Circuit's handling of *McCants*.

IV. 2nd Circuit: No Conditions May Be Imposed on Defendants.

Defendants paid $3,534.59 for copies of MidCountry's records. (RA 132 p. 2 Table 2). The lower court denied Plaintiffs' motion for an *in camera* review before those records were to be given to Defendants. (RA 75 pp. 16–17; RA 107 p. 5). Since the confidentiality order entered in the case required only non-litigants to sign Exhibit A, and only Exhibit A required a return of documents (RA 60), Defendants were under no legal obligation to return any confidential documents.

Nevertheless, as part of the order of dismissal, the district judge ordered that the copies of MidCountry's records be returned to MidCountry, "the party that produced those documents" (RA 141 p. 13), which thus imposed a dismissal condition upon Defendants. The panel's affirming this ruling conflicts with the 2nd Circuit which has held that there is no authority under Fed.R.Civ.P. 41(a)(2) to impose dismissal conditions upon Defendants. *Cross Westchester Dev. Corp. v. Chiulli*, 887 F.2d 431, 432 (2d Cir. 1989).

V. D.C. Circuit: District Court Cannot Eliminate Material from Record on Appeal.

Upon court order, MidCountry's records were filed with the district court (RA 63-36 pp. 2–3; RA 231 p. 7), and then said to be lost by the district judge's docket clerk (who had signed for them) and by the magistrate judge's clerk. (RA

206-2; RA 206 pp. 2–4). After the district judge ordered them to be returned to the bank, the court surrendered them to Plaintiffs instead. (RA 141 p. 13; RA 160). Defendants moved below for them to be forwarded to this Court as part of the record on appeal, which was denied. (RA 204; electronic order dated 1/29/2010).

By summarily denying Defendants' motion here to rectify this matter, the panel's decision comes into conflict with the D.C. Circuit, which has held that the Federal Rules do not permit the district court to eliminate any part of the occurrences below which Defendants wish included in the record on appeal. *Belt v. Holton*, 197 F.2d 579, 581 (D.C. Cir. 1952).

VI. 11th Circuit Must Be Correct: Fed.R.Civ.P. 41(a)(2) Not Restricted by 28 U.S.C. § 1920.

The district court invited Defendants to file a motion for "costs, fees, expenses." (RA 141 pp. 14–16). But the district court then determined that only costs falling under 28 U.S.C. § 1920 could be imposed. (RA 166 pp. 2–3).

By affirming the lower court's determination on this point of law, the panel conflicted with the 11th Circuit: "Costs may include ***all*** litigation-related expenses incurred by the defendant, including reasonable attorneys' fees." *McCants*, 781 F.2d at 860, emphasis added. Costs under Fed.R.Civ.P. 41(a)(2) cannot be restricted by § 1920 if they may include "all" expenses.

The 11th Circuit must be correct, since the very inclusion of reasonable attorneys' fees, which the 1st Circuit permits, is outside the scope of § 1920.

Puerto Rico Maritime Shipping Authority v. Leith, 668 F.2d 46, 51 (1st Cir. 1981).

The 11th Circuit's ruling avoids the inequity of only represented litigants obtaining reimbursement of non-§ 1920 expenses when those expenses are paid for via attorney's fees.

VII. Supreme Court: Ownership and Privacy Interest of Bank Records

MidCountry's records consist of bank statements for four accounts owned by Danny Lee Shelton ("Shelton"), one account owned by DLS Publishing, Inc. ("DLS"), and five accounts owned by Three Angels Broadcasting Network, Inc. ("3ABN"). (RA 63-30 p. 5). 3ABN and DLS never objected to Defendants' subpoena of MidCountry. (RA 63-27).

Regarding forwarding MidCountry's records to this Court, the lower court ruled:

> The fact that defendants paid for the copying of these records does not confer ownership on them and until a ruling by the magistrate judge that defendants were entitled to these documents,[2] plaintiff Shelton's right to this private information trumped defendants' right to see and distribute them.[3]

(RA 261 p. 3).

On appeal and by motion, Defendants contended that (a) Shelton did not own and had no privacy interest in MidCountry's records, and (b) Shelton could

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[2] The magistrate judge's denial of Plaintiffs' motion to conduct an *in camera* review before giving MidCountry's records to Defendants constituted such a ruling. (RA 75 pp. 16–17; RA 107 p. 5).

[3] Defendants' motions pertaining to forwarding MidCountry's records to this Court did not ask for Defendants to see or distribute them. (RA 204; RA 210).

not appear on behalf of 3ABN and DLS. (Defendants' principal briefs in Case No. 08-2457 ("DB1") pp. 59–60, and in Case No. 09-2615 ("DB2") p. 48; Defendants' 10/25/2010 Motion to Forward Part of District Court Record p. 13).

By affirming the lower court and denying Defendants' pending motions, the panel's decision conflicts with the ruling of the Supreme Court in two ways: (a) Bank records are "the business records of the banks," not Plaintiffs' "private papers," and Plaintiffs have "no legitimate 'expectation of privacy'" regarding these bank records. *Miller*, 425 U.S. at 440–443. (b) Shelton cannot assert a privacy interest in federal court on behalf of DLS and 3ABN. These corporations must do that themselves through licensed counsel. *Rowland*, 506 U.S. at 201–202.

VIII. 10th Circuit: Ownership of Discovery Materials.

Mass.R.Prof.C. 1.16(e)(3) indicates that payment of costs confers an ownership interest in discovery materials in an attorney's client's file. (cited at DB2 p. 48). But the lower court contended that payment of costs "does not confer ownership on" Defendants (RA 261 p. 3), despite the fact that the magistrate judge had already denied Plaintiffs' request for an *in camera* review before giving MidCountry's records to Defendants. (RA 75 pp. 16–17; RA 107 p. 5). The issue is important, since it may affect Defendants' contentions that they were deprived of property without due process and just compensation. (DB1 pp. 59–60; DB2 p. 49).

By affirming the lower court, the panel seems to conflict with the 10th Circuit, which holds that an attorney's client does have "ownership rights" to the

materials in his file which he has "presumably paid for." *In re Grand Jury Proceedings*, 727 F.2d 941, 944–945 (10th Cir. 1984). Thus, payment of costs does confer an ownership right upon discovery materials.

IX. 9th Circuit: Fed.R.Civ.P. 41(a)(2) Cannot Be Used to Avoid Discovery.

After resisting discovery throughout the case, Plaintiffs moved to dismiss on October 23, 2008. (RA 120). Plaintiffs then immediately notified Defendants that they would not comply with the court-ordered discovery deadline of October 27, contradicting Plaintiffs' October 22 representation made in open court. (RA 127-30; RA 107 p. 4; RA 152-6 p. 35)

By affirming the lower court, the panel's decision conflicts with the 9th Circuit, which denied voluntary dismissal motions that were "thinly-veiled attempts to avoid discovery." *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996).

X. 1st Circuit: Fed.R.Civ.P. 52(b) Must Be Applicable.

A party who believes that the court's factual findings or conclusions of law "are erroneous in any respect" may file a motion pursuant to Fed.R.Civ.P. 52(b). *Jackson*, 156 F.3d at 234. The lower court found that Rule 52(b) was "clearly inapplicable" to a motion to amend findings (RA 193 p. 2 n.1), and the panel has affirmed, putting its decision at conflict with the 1st Circuit.

ARGUMENT FOR PANEL REHEARING

I. Use of Explicitly Relevant Court Order Cannot Be "Without Merit."

The district judge's *sua sponte* recusal order (RA 226) shows that he had

objectively determined that Defendants had "suppl[ied] a factual basis for an inference of lack of impartiality" by an objective observer. *U.S. v. Giorgi*, 840 F.2d 1022, 1036 (1st Cir.1988). Defendants supplied this factual basis in a December 2009 filing, and in a *non-public* judicial misconduct complaint. (RA 213 pp. 10–12; RA 226). The supplied factual basis, not the mere filing of the complaint, triggered the *sua sponte* recusal order, since "[t]he mere filing of a complaint of judicial misconduct is not grounds for recusal." *In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1265 (11th Cir. 2009); *In re Mann*, 229 F.3d 657, 658 (7th Cir. 2000).

Defendants then used the recusal order to request a high degree of scrutiny under the abuse of discretion standard. (DB2 p. 25). Even if the district judge issued his recusal order in error, Defendants' use of that order to support their allegations of bias cannot be "without merit" as the panel has ruled (*supra* 2): The judge's own determination in an explicitly relevant court order ***must*** constitute merit, and must therefore give merit to Defendants' request for greater scrutiny.

II. "Substantial Question" Must Have Been Presented.

The panel's decision invokes 1st Cir. Loc. R. 27.0(c), which permits summarily affirming the lower court when it is "clear that no substantial question had been presented." In a different context, a "substantial question" is one that is close or could very well be decided the other way. *U.S. v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985). In essence, the panel determined that 1st Circuit precedent is fixed on each and every one of Defendants' questions of law, and that there is no

real question of fact.

Given all the facts and arguments Defendants presented in their appellants' briefs (and in the instant petitions), it seems unfathomable that each and every question presented was clearly insubstantial.

How should we understand this summary disposition? That clearly erroneous findings, contradictory orders, and failing to exercise discretion are not an abuse of discretion? (DB1 p. 35; DB2 pp. 42–48, 56, 45, 54–55, 58–59, 28–29). That it is not an abuse of discretion to set aside findings of fact without those findings being clearly erroneous? (DB2 pp. 44–45). That litigants, such as Shelton, can obtain a voluntary dismissal without prejudice without giving any reasons at all? (DB1 pp. 43–44; DB2 p. 34). That 3ABN's reasons for dismissal suffice, without an evidentiary hearing, despite evidence in the record that impeaches both those reasons and 3ABN's affiant? (DB1 pp. 38–42; DB2 pp. 29–31, 34–35).

Reimbursement for wasted costs, such as the $3,534.59 worth of copies of MidCountry's records (RA 132 p. 2 Table 2), was denied. The justification given was that requiring Plaintiffs to refile their claims in the same court already addressed "any potential legal prejudice" (RA 166 p. 3), a condition that does nothing to cure the loss of MidCountry's records, and is meaningless if Defendants must pursue their claims in state court because of lack of diversity. Whether or not this amounts to manifest injustice is clearly not an insubstantial question.

Certainly, the assertion that not one single fact or point of law presented is a

close question is unfathomable.

III. Composition of the Appellate Panel.

The chief judge dismissed Defendants' judicial misconduct complaint on May 24, 2010.[4] (Ex. A). Defendants petitioned for review, and the dismissal was affirmed on December 14, 2010.[4] (Ex. B). Thereafter, two of the judges who issued those two orders sat on the panel to which Defendants' appeals were submitted.

Judges must disqualify themselves when they have "personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1). Personal knowledge includes "[o]ff-the-record briefings in chambers" which "leave no trace in the record," since such knowledge cannot be "controverted or tested by the tools of the adversary process." *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996).

Proceedings concerning judicial misconduct complaints are secret, and materials and information considered by the chief judge and the judicial council, including communications from the subject judge or his clerks, are off the record. R.J.C.J.D.P. 23(a), 11(b), 18(c)(2)(B).

Both orders regarding Defendants' misconduct complaint assert, "if there was a clerical error made in connection with the management of these documents –

[4] Some statements in these two orders cannot be properly assessed without reviewing Defendants' complaint and petition, such as the assertion that Defendants changed their argument regarding whether the copies of MidCountry's records should be given (a) to Defendants or (b) returned to MidCountry. (Ex. B p. 13). In reality, Defendants' misconduct complaint made both these points.

However, attaching the non-public misconduct complaint and petition seems inappropriate. Therefore, Defendants attach only the public orders here.

of which *there was no evidence* ....” (Ex. A p. 10; Ex. B p. 14; italics added).

According to sworn testimony, the district judge’s docket clerk (who signed for those documents) and the magistrate judge’s clerk told Defendants that MidCountry’s records were lost at the courthouse,[5] and Defendants were never notified otherwise. (RA 206-2; RA 206 pp. 2–4). This testimony is corroborated by May 2009 filings. (RA 177 p. 5 n.4; Defendants’ reply brief in Case No. 08-2457 p. 4 n.4). The district judge clearly ordered that MidCountry’s records be returned to MidCountry, which were given to Plaintiffs instead.[6,7] (RA 141 p. 13; RA 160).

Yet the orders in question treat this clear evidence from the record as if it is utterly and entirely impeached, a conclusion that is certainly not based on the record, and must therefore be based upon personal knowledge acquired during the misconduct proceedings. Therefore, given the summary disposition of the instant appeals despite the many issues raised by Defendants, to avoid an appearance of partiality, the case should be restored to the calendar for either reargument before or resubmission to a panel of judges without such personal knowledge.

IV. Motion for Sanctions and Motions to File Under Seal.

A. re: the Remnant Documents.

[5] Despite Defendants’ complaints, appeals, and inquiries below and here, why the clerks of the district court told Defendants that MidCountry’s records could not be found has never been addressed, much less explained.

[6] Why MidCountry’s records were given to a party that had not produced them, in violation of the district judge’s order, has also not been explained.

[7] Defendants’ misconduct complaint and petition cited these points and evidence.

The district judge abused his discretion when he determined the degree to which Plaintiffs had sanctionably mischaracterized the contents of documents produced by Remnant Publications, Inc. ("Remnant documents"), without first reviewing the Remnant documents themselves to determine the degree to which Plaintiffs had sanctionably mischaracterized the contents of those documents.[8] (RA 193 pp. 3, 1–2 (denied reconsideration of RA 153); RA 184 p. 3).

B. Plaintiffs' False Allegations of Discovery Abuse.

Plaintiffs repeatedly accused Defendants of issuing foreign subpoenas as an end run around pending motions for protective orders (RA 63-27 p. 8; RA 63-28 p. 11; RA 140 p. 5; etc.), and Defendants moved for sanctions. (RA 184 pp. 9–10).

This Court should have no doubt that Plaintiffs' allegations are a lie since Plaintiffs on brief openly asserted to this Court that: (a) Defendants' requests to produce were served in late November and early December 2007, *after* a December 18, 2007 motion; (b) subpoenas dated late *November* 2007 were an end run around the same *December 18*, 2007 motion; and (c) these early discovery requests were the carrying out of a strategy outlined in a *January 20*, 2008, email, which referred to a *yet future* expansion of the case (by adding parties). (Plaintiffs' brief in Case

[8] The district judge may have justified his failure to review the Remnant documents by mistakenly thinking that the non-litigant return requirement of the confidentiality order's Exhibit A applied to litigants, when litigants aren't required to sign Exhibit A. (RA 193 p. 3; RA 60). The order dismissing Defendants' judicial misconduct complaint made that mistake as well, but the order affirming that dismissal does not contest Defendants' valid point that litigants do not have to sign Exhibit A. (Ex. A p. 8; Ex. B p. 13).

No. 09-2615 pp. 8–10; RA 76-5 p. 33; RA 152-17; RA 152-18).

Under *Leith*, mutual allegations of discovery abuse were felt to justify a voluntary dismissal without any conditions. *Leith*, 668 F.2d at 51. Given that Plaintiffs' end-run and abusive-discovery timelines are an intentional fabrication, Plaintiffs' allegations should instead result in self-incrimination.

Defendants appreciate that courts do not visit each and every infraction of rules or ethics with sanctions. Yet zealous advocacy must have limits, and ethics rules are not a dead letter, if justice is to be served in the end.

PRAYER FOR RELIEF

WHEREFORE, Defendants pray the Court to GRANT this petition for panel rehearing, and to GRANT this petition for rehearing *en banc*.

Respectfully submitted,

Dated: May 24, 2011

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CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on May 24, 2011, I served copies of this notice and motions on the following registered parties via the ECF system:

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