In The
United States Court of Appeals
For The First Circuit

No. 08-2457 & 09-2615

Three Angels Broadcasting Network, Inc.,
an Illinois Non-Profit Corporation;
Danny Lee Shelton,

Appellees,

v.

Gailon Arthur Joy and Robert Pickle,

Appellants.

APPELLEE'S RESPONSE TO APPELLANTS' MOTION TO AMEND DOCUMENTS AND FOR SANCTIONS

M. Gregory Simpson
Meagher & Geer P.L.L.P.
33 South Sixth Street #4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

John P. Pucci
J. Lizette Richards
Fierst, Pucci & Kane, LLP
64 Gothic Street
Northampton, MA 01060

Attorneys for Appellees

INTRODUCTION

Plaintiffs-Appellees Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively "3ABN") submit this response to Defendants-Appellants' motion to amend their "status reports" and for sanctions, electronically filed on April 18, 2010. Appellants made these motions in their response to a motion by 3ABN to strike unauthorized and argumentative filings made by the Appellants that they labeled "status reports." 3ABN has previously filed its reply to Appellants' response to its motion, and now separately submits its response to Appellants' motion to re-file their status reports with amendments and for sanctions against 3ABN.

RELEVANT HISTORY

This suit was voluntarily dismissed in November of 2008. (Doc. 129). Appellants, who were defendants below, responded to the dismissal of the claims against them by simultaneously appealing to this Court and filing a motion in the district court for an award of their litigation expenses. (Docs. 130 and 133). The district court denied the motion for an award of expenses on April 13, 2009. (Doc. 166). Appellants then filed a motion for reconsideration. (Doc. 169). The appeal, which had progressed to the point that briefing was complete and the matter submitted for decision, was then suspended by order of this Court issued August 19, 2009. Appellants were ordered to file status reports every 60 days until the motion for reconsideration was decided.

Appellants filed their first status report on October 5, 2009. Buried deep within the 12-page document was a single sentence reporting the status of things in the district court, i.e., that the motion for reconsideration had not been decided yet. The rest of the

report, however, was a rehash of arguments that had been made by the Appellants that were either rejected or ignored by the district court at various points in the life of the case. It also contained many assertions, accusations and arguments that were not of record and either seemed to originate from the fertile imagination of the Appellants or had nothing to do with anything, or both. Trusting that the Court would ignore the extraneous material and premature argument contained in the status report, 3ABN did not at that time move to strike the status report.

Three weeks after the first status report, on October 26, 2009, the district court denied all of Appellants' outstanding motions, including the motion to reconsider and the motion for sanctions against 3ABN. (Doc. 193). At that time there were no unresolved district court motions and the case was ripe for appeal. Appellants filed a second notice of appeal on November 23, 2009. (Doc. 196).

But a few weeks later, on December 9, 2009, Appellants brought the first of several post-appeal motions seeking to add materials to the Court of Appeals' record. They moved to "forward" records consisting of a box of documents that had been produced by a non-party to Magistrate Judge Hillman for *in camera* inspection, referred to as the "MidCountry Bank" records. (Doc. 204). These records had never been used as evidence in connection with any motion made to the district court, and in that sense were not part of the district court record for purposes of the appeal. At the time of the dismissal, 3ABN had moved Judge Saylor to order return of the box of raw discovery materials to them, and Judge Saylor had granted the motion. (See Electronic Clerk's Notes dated 10/30/2008). Appellants did not move for reconsideration of that issue, and

did not seek a stay of the order to return the records, so the courthouse staff delivered them to 3ABN's messenger and a receipt reflecting that fact was entered in the record on December 16, 2008. (Doc. 160).

A few weeks after their motion to forward the MidCountry Bank records to the Court of Appeals, on December 18, 2009, Appellants brought a motion to compel 3ABN to return the MidCountry Bank records to the district court so that they could be forwarded to the Court of Appeals. (Doc. 210). Appellants claimed they did not know that Judge Saylor's order of October 2008 to return the MidCountry records to 3ABN had been executed more than a year before, despite having been present when Judge Saylor granted 3ABN's motion in open court on October 30, 2008, having received the electronic clerk's notes of the order the same day, having received electronic notification of the receipt when 3ABN's counsel retrieved the documents on December 16, 2008, and having never suggested that Judge Saylor's order should not be implemented and that the MidCountry records should not be delivered to 3ABN. They argued that Judge Saylor's order that the MidCountry Bank records be "returned" meant that they should have been sent back to MidCountry Bank, not 3ABN, and that turning them over to 3ABN – whose private information was contained in the records – deprived them of property without due process. However, the motion that Judge Saylor had granted asked to grant possession of the MidCountry Bank records to 3ABN. The parties and the district court understood perfectly that Judge Saylor meant for the records to go to 3ABN, and that is exactly what happened.

At some point prior to January 15, 2010, the Appellants made a baseless charge of judicial misconduct against Judge Saylor which caused him to recuse himself. (Doc. 226). Judge Rya Zobel was assigned to take his place. On January 29, 2010, Magistrate Judge Hillman, to whom the Appellants' motions had been referred, denied the motions. (See Electronic Orders entered on January 29, 2010). Judge Hillman then also withdrew.

On February 3, 2010, the Appellants filed objections to Magistrate Judge Hillman's orders. (Doc. 229). Two days later, on February 5, 2010, Appellants filed their second status report with this Court. The report had not been invited and was completely unauthorized. It begins with these words: "Though not required to do so, Defendants hereby voluntarily present this status report to keep this Court abreast of developments in the district court." The report was filed in both appeal No. 08-2457 and 09-2615. It advised this Court about the judicial misconduct allegations the Appellants had made against Judge Saylor, and set forth in argumentative fashion the positions the Appellants had taken in their objections to the rulings denying their motions, making no effort whatsoever to present a balanced presentation of the status of matters pending in the district court.

On February 26, 2010, Appellants filed another motion to add material to the district court record on the basis that it refuted contentions made by 3ABN. (Doc. 236). The material involved in this motion is referred to as the "Remnant" documents, since they were obtained under the protective order entered in this case from Remnant Publications pursuant to an out-of-district subpoena. 3ABN opposed the motion on the basis that they were irrelevant to any pending issue -- Appellants had moved to introduce

these documents into the record on three prior occasions and were denied each time. (Doc. 238).

On March 18, 2010, Appellants delivered an *ex parte* letter to the District Court indicating that they had now accused the courthouse staff of improper conduct ("mishandling" and "expropriation") relating to the MidCountry Bank records. (Doc. 244).

On April 1, 2010, Appellants served yet another motion to enlarge the district court record, this time to include newly issued arrest warrants for Tommy Shelton, brother of Appellee Danny Shelton. (Doc. 245). Without waiting for permission to be granted, they filed the exhibits along with their motion.

Although everything filed in the district court is automatically forwarded to the First Circuit Court of Appeals, Appellants took it upon themselves to file a *third* "Status Report" with this Court on April 6, 2010. It attached several copies of the Tommy Shelton arrest warrants and regurgitated Appellants' arguments made in the pending district court motion, and critiqued 3ABN's opposition to the motion in an inflammatory and argumentative manner, and was in substance a surreply. This document was unauthorized and uninvited. It made a specious argument as to relevancy, but was clearly intended to prejudice this Court against 3ABN for reasons unrelated to the issues on appeal, and for no proper reason. As with the second status report, it was filed in both appeal files. As with the second status report, it began with the words: "Though not required to do so, Defendants hereby voluntarily present this status report to keep this Court abreast of developments in the district court."

3ABN then moved this Court to strike the status reports on the basis that they were argumentative and unnecessary, and two of them were completely unauthorized and uninvited. 3ABN asked this Court to award it a modest amount of attorneys' fees to shift the burden of the Appellants' vexatious litigation conduct onto Appellants. Appellants responded with the present motion to file two amended status reports and for an award of sanctions against 3ABN.

I. APPELLANTS' MOTION TO FILE AMENDED STATUS REPORTS SHOULD BE DENIED.

Appellants' motion to file their amended status reports should be denied for the same reasons the Appellants should not have filed them in the first place: They are unauthorized, unnecessary and unduly argumentative. Defendants' Amended Second Status Report (Ex. A to their motion) and Defendants' Amended Third Status Report (Ex. B to their motion) differ from the originals in that the first sentence in each, which had conceded that the report was "not required," is removed. In its place is a sentence indicating that this Court's August 19, 2009 order imposed a continuing obligation on Appellants to keep the Court of Appeals informed of the status of matters in the district court that "impede the progress of Defendants' appeals here." Appellants' reinterpretation of this Court's August 19 order is complete fiction. The August 19 order instructed Appellants to file status reports every 60 days "and promptly inform this court once the motion for reconsideration has been decided by the district court." By its terms, the obligation expired once the motion for reconsideration was decided on October 26, 2009 – after the first status report.

Appellants acknowledged their understanding of this Court's order in several ways. Their first status report explained that the order to file status reports was issued "since Defendants' motion to reconsider and to amend findings are pending in the district court." Their second and third reports acknowledged that they were no longer under an obligation to file status reports, but were doing so "voluntarily." Thus, they knew the obligation to file status reports would end when the motion for reconsideration was decided.

If more proof than Appellants' own writings were necessary, it is found in their conduct. They filed the first status report 47 days after the August 19 order, which was within the 60-day period and therefore timely. But the second status report was filed on February 5, 2010, which is *123 days after the prior status report*. If they really believed they were supposed to file status reports every 60 days, they missed the deadline by a long shot. Appellants have been demonstrably dishonest to this Court in stating that they understand the August 19 order requires them to file status reports every 60 days until the court tells them to stop. Their words and conduct demonstrate that this is not how they understood the August 19 order.

Appellants' motion to file these offensive documents should be denied for the additional reason that Appellants purport to file these status reports in the *current* appeal, 09-2615, as well as in the original appeal, 08-2457. They were never ordered to file status reports in the new appeal file. The August 19 order was relates to the original appeal. These documents do not belong in the record, and should be stricken.

Appellants did not wait for permission to file their amended status reports, but filed them along with their memorandum. They did the same thing in the district court in their motion to file the obviously irrelevant Tommy Shelton arrest warrants. As a Minnesota federal judge recently observed, "This is akin to lighting a cigar and then asking, 'Is it okay if I smoke?' It betrays a lack of respect for the rules of this Court …." *Hartford Fire Ins. Co. v. Clark,* Case No. 03-CV-3190 (PJS/JJG) (Schiltz, J.). If the status reports were authorized at all, it was in the original appeal only, because that is the appeal in which this Court ordered status reports every 60 days. Appellants' motion should be denied to the extent it seeks to file these status reports in File No. 09-2615. It should be denied in its entirety for the reasons outlined above.

II. APPELLANTS' MOTION FOR SANCTIONS.

Appellants bring their own motion for sanctions against 3ABN for a number of reasons scattered throughout their brief. The first reason given is that "Plaintiffs' stubborn refusal to return the sole copy of part of the district court record created the current impasse . . . necessitating the filing of periodic status reports." (Defendants' Brief at pp. 7- 8). Appellants neglect to mention that Judge Hillman denied their motion to compel return of the MidCountry Bank records. (See Electronic Orders entered January 29, 2010). 3ABN's position that the MidCountry Bank documents should not be part of the district court record for purposes of the appeal has been held to be correct. Clearly it cannot be a basis for sanctions.

Appellants make their usual allegations of "intentional and material misrepresentations" by quoting snippets taken from 3ABN's brief and arguing they are

inaccurate. They list six of these at pages 9-13 of their brief. The first involves 3ABN's assertion that "Appellees had opposed those arguments [recounted in the first status report] in the District Court (and prevailed in every respect)." This is said to be an "intentional and material misrepresentation" because Appellees did not prevail in every respect until *after* the first status report was filed, whereas the quoted snippet implies that 3ABN had already prevailed in every respect when the status report was filed. The construction proposed by Appellants of this sentence is plausible only if one fails to read the very next sentence, which advises that "On October 26, 2009, the District Court issued its order denying Defendants' motion to reconsider and amend the judgment." 3ABN thus advises *in the very next sentence* exactly when it prevailed in every respect. Appellants are masters of omitting and distorting context in order to make arguments that are facially plausible, but which dissipate upon examination like a foul odor in a breeze.

The second and third "intentional and material misrepresentation of the facts" that Appellants complain about relate to portions of 3ABN's motion indicating that Appellants implied in their second status report that Judge Saylor recused himself because he was partial to 3ABN. (Response pp. 9-10). Instead of retreating from this ridiculous implication, Appellants charge forward like a bull in a china shop, stating that "the judge's reference to questions about his impartiality must refer to prior rulings, not just future rulings." (Appellants' Brief at p. 11). Appellants' extraordinary assertion that a United States District Court Judge not only issued rulings favoring one party because he was partial to it, but that the same judge *admitted* as much in his order of recusal, illustrates how these Appellants think, and how capable and willing they are to twist

words to suit their purposes. The only implication in Judge Saylor's order of recusal is that he felt his partiality might *henceforth* be questioned given that Appellants had baselessly accused him of judicial misconduct. Appellants did imply, and now openly allege, that Judge Saylor's recusal order admits that he had been partial to 3ABN in issuing his prior rulings. Obviously it does no such thing.

Appellants next quibble with a snippet from Appellants' motion stating that the Tommy Shelton criminal charges are irrelevant. (Response p. 11). This contention is among the "intentional and material misrepresentations of fact" of which 3ABN is said to be guilty. Appellants contend that the recent charges against Tommy Shelton are relevant because 3ABN has now "admitted" that the allegations against Tommy Shelton "framed the original basis of Plaintiff's lawsuit." This is another example of clever editing by the Appellants intended to mislead the Court. The quoted words are part of a sentence that read: "Pickle and Joy have long made uncorroborated, unfounded allegations against Danny Shelton and 3ABN, including claims that they covered up allegations of child molestation against a 3ABN employee, financial mismanagement, and other misconduct that framed the original basis for Plaintiffs' lawsuit against them." (Doc. 231, p. 5).

As is their practice, Appellants have altered this sentence by omitting words and punctuation to give the false impression that 3ABN is saying that claims that it covered up allegations of child molestation "framed the original basis for the Plaintiffs' lawsuit against them." In context, the sentence does not indicate which of the numerous baseless allegations by the Appellants was part of the original lawsuit. It is a matter of record that 3ABN's lawsuit did *not* raise the issue of allegations regarding covered up child

molestation, Tommy Shelton, or anything related to those topics. One need only read the Complaint to verify this. (Doc. 1). 3ABN could no more "admit" that the case was about Tommy Shelton and the cover up of allegations of child abuse than it could "admit" that a dog is a cat. The case was about the matters described in the Complaint, and the Complaint doesn't mention Tommy Shelton, or child abuse, or a cover up of child abuse.

Appellants next take issue with a sentence indicating that the third status report takes three sentences in 3ABN's briefs, which Appellants label as "damaging admissions," out of context. (Response at p. 12). The first of these is a statement that the MidCountry Bank records were "filed under seal," which Appellants assert amounts to an admission that they were "filed" and therefore proof that the documents should be part of the appellate record. "Filed" in the context of this sentence, however, simply means "delivered to the courthouse." It is a matter of record, demonstrable by reviewing the court's docket sheet, that the MidCountry Bank records were never filed in the sense that a brief is filed. Appellants fail to appreciate that only documents submitted to the court to aid in resolution of a disputed issue become part of the record on appeal. Raw discovery materials sent to the court for *in camera* review, and never reviewed, do not fit the bill.

The second "damaging admission" that 3ABN said was taken out of context relates to a statement in 3ABN's response to Appellants' objections indicating that Judge Hillman's decision to withdraw after denying Appellants' motions was "not surprising." (Doc. 231 at p. 7). Appellants say that this sentence constitutes an admission by 3ABN that Judge Hillman should have recused himself before issuing his rulings. (Doc. 233 p.

2). The words that Appellants quote appear in a paragraph detailing the Appellants' campaign of harassment against the courthouse staff, including the judges and the clerk. It was not surprising that Judge Hillman would withdraw from the case because the Appellants are so exceedingly unpleasant. Again, Appellants omit context to create a false impression.

The third "damaging admission" that 3ABN said was a distortion of its position relates to Appellants' argument that 3ABN has admitted that this case is partly about Appellants' allegations against Tommy Shelton. As explained above at page 11, 3ABN did not make any such admission, and the assertion is not true. As framed by 3ABN, this case has never involved Tommy Shelton, his alleged criminal conduct, or allegations that his alleged conduct was covered up. A review of the Complaint will confirm that undeniable fact. Appellants have tried to insert extraneous issues including issues involving Tommy Shelton, but none of the claims for relief in this case relate to these issues.

Appellants seem to also base their request for sanctions on what they consider to be improper motivations for 3ABN's motion to strike the status reports. (See Appellants' Response. at pp. 14-16). At bottom, each of these arguments amounts to this: Appellants disagree with 3ABN's positions and find most of them to be outrageous, even though the district court has agreed with 3ABN at every opportunity it has had. Time, space and patience do not permit a point-by-point rebuttal of each of the Appellants' arguments. 3ABN's motion is meritorious, and the fact that Appellants don't agree with it is no basis for sanctions.

Appellants suggest that the undersigned "habitually and routinely violates" the ethical rule requiring attorneys to correct false statements of material fact or law. (Response p. 16). It would be more accurate to state that the undersigned is habitually and routinely *accused* of violating ethical rules by these Appellants, but that none of the accusations has been sustained by a judge and none of them has the least bit of merit. Being accused of misdeeds by these Appellants is an inherent result of disagreeing with them. Judge Saylor, Magistrate Judge Hillman, the courthouse staff, 3ABN, Danny Shelton and the undersigned have all discovered the unfortunate fact that these Appellants are reputational piranhas – they feed on the good names of other people. Everything that happens in this lawsuit is reported and discussed and debated on various web sites and blogs, including www.3abnvjoy.com. Everything they submit to this Court is intended for a wider audience, which explains why they do not limit their submissions to the issues at hand.

Appellants' argument that the undersigned routinely violates his ethical obligations is supported by only one example, the supposedly false statement of "fact" (it is actually argument) that the arrest records of Tommy Shelton are irrelevant. Appellants contend that the motion to strike the status reports is motivated by a desire to "avoid correction" of these false statements and thus to perpetuate a fraud on the court. (Response p. 16).

The short answer to Appellants' argument is this: 3ABN's position that the arrest warrants for Tommy Shelton are irrelevant is correct, and the undersigned did not violate any ethical duties by advancing that argument. This case is not about Tommy Shelton or

his conduct and never has been. Neither 3ABN nor the undersigned ever indicated anything to the contrary, and Appellants' suggestion to the contrary is false. On behalf of 3ABN, the undersigned has presented argument and authorities supporting the position that the Tommy Shelton exhibits are irrelevant and should not become part of the district court record. (Doc. 249). By filing these documents in this Court as part of a "status report" without waiting for a determination by the district court that the Tommy Shelton arrest warrants should be considered in connection with the pending motions, Appellants have made the district court's ruling moot. They lit the cigar first, and asked if it was okay later. Only by expunging these documents can the appellate court record be restored to the *status quo ante*.

Finally, Appellants provide a list of "additional reasons to sanction plaintiffs' counsel," which boil down to an argument that the undersigned is not a competent lawyer. (Response at p. 17). Appellants make the helpful suggestion that the *pro hac vice* status of the undersigned should be revoked and he should be replaced by 3ABN's Massachusetts-based co-counsel because Appellants would then be "at a considerable disadvantage." (Response p. 17).

Without belaboring the point, the examples of incompetence supplied by Appellants are simply instances in which they disagree with 3ABN's position. Appellants base their contention of incompetence on "three damaging admissions" in the memo 3ABN filed in response to their objections to Magistrate Judge Hillman's orders denying their outstanding motions to enlarge the record. (Response at p. 16). Each of these supposed admissions was not in fact an admission, but a tortured misreading of

3ABN's position. Appellants state that a failure to show how these three "admissions" is out of context would constitute proof that the undersigned "lied in his motion to strike." (Response at p. 17). 3ABN has debunked each of the supposed "admissions" above at pages 12-13.

CONCLUSION

For the reasons stated herein, 3ABN asks that Appellants' motion to file amended status reports and for an award of sanctions be denied.

Respectfully submitted,

Dated: April 28, 2010

By s/ M. Gregory Simpson

M. Gregory Simpson
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

John P. Pucci, BBO #407560
J. Lizette Richards, BBO #649413
Fierst, Pucci & Kane, LLP
64 Gothic Street
Northampton, MA 01060
(413) 584-8067

Attorneys for Appellees
Three Angels Broadcasting Network
and Danny Lee Shelton

7299299.1