

In The
United States Court of Appeals
For The First Circuit

No. 09-2615

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

Appellees,

v.

Gailon Arthur Joy and Robert Pickle,

Appellants.

**APPELLEES' RESPONSE TO DEFENDANTS-APPELLANTS' MOTION
TO FILE UNDER SEAL AND MOTION FOR SANCTIONS AGAINST
DEFENDANTS-APPELLANTS**

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Appellees Three Angels Broadcasting Network, Inc. (“3ABN”) and Danny Lee Shelton (“Appellees”) submit this response to Appellants’ (Defendants below) Motion to File Under Seal, and ask that the Court reject Appellants’ attempted filing of (1) “Sealed Exhibits for Supplemental Appendix Pages SE 001-SE 158 Filed Under Seal”; (2) “Affidavit of Robert Pickle Filed in First Cir. Case No. 08-2457 Filed Under Seal”; and (3) “Sealed Supplemental Brief of Defendants-Appellants Filed Under Seal.” Appellees further move for an award of sanctions against Appellants on the authority of 1st Cir. R. 38.0, which authorizes sanctions for vexatious litigation.

The sealed exhibits that Appellees want to file include (1) exhibits that were expressly rejected for filing by the district court and are therefore not part of the district court record; and (2) an affidavit by Robert Pickle that was expressly rejected by this Court’s order dated December 4, 2009 in the prior appeal of this case.

These documents are not properly part of the appellate court record because they were not first made part of the district court record. *See* Fed. R. App. P. 10(a). Appellants may be acting *pro se*, but they have previously been educated by this Court that such documents “are not properly considered as part of the record in this appeal.” (*See* Order dated Dec. 4, 2009). Appellants have nonetheless now filed thousands of pages of documents with this Court, in paper form and on a CD, that

are not properly part of the appellate record. Further, the proffered exhibits are completely irrelevant to the issues on appeal.

RESPONSE TO FACT SECTION

Appellants seek to file under seal (a) exhibits that they have previously been forbidden from filing; (b) Robert Pickle's affidavit previously filed and rejected by this Court in the prior appeal; and (c) a supplemental brief addressing the newly filed exhibits.

A. The New Exhibits.

Appellants have submitted for filing under seal a packet of bound exhibits, captioned "Sealed Exhibits For Supplemental Appendix Pages SE 001-SE 158." Appellants assert that "The exhibits and affidavit were offered to the lower court" in connection with electronic docket entries 153 and 173. (Defendants' Motion to File Under Seal, p. 1). Docket entries 153 and 173 are motions by Defendants in the district court for leave to file documents under seal. Appellees opposed those motions on various grounds, primarily relevance. *See* Doc. 158 and Doc. 174.

Agreeing with Appellees, the district court denied Appellants' motions. *See* Electronic Order by Judge Saylor dated 4/15/2009 (denying the motion at docket number 153, and stating "The documents do not appear to be relevant and were not considered by the court in connection with the underlying dispute."); Doc. 193 at p. 3 (denying the motion at docket number 173, and stating "The relevance of the

documents is unclear...Furthermore, to the extent that the materials are subject to the Confidentiality and Protective Order issued by Magistrate Judge Hillman in this matter on April 17, 2008, they should have been returned to plaintiffs some time ago.”).

Thus, the district court did not permit the filing of these documents, and this Court’s scope of review will be limited to reviewing that decision on an abuse of discretion standard. The documents may not be considered as part of that review.

B. The Pickle Affidavit.

Appellants next seek to file a document captioned “Affidavit of Robert Pickle Filed in 1st Cir. Case No. 08-2457.” Although appearing to concede that this document was filed for the first time in the first appeal of this matter, Appellants confusingly assert that “The exhibits *and affidavit* were offered to the lower court.” (Def. Mot. to File Under Seal p. 1). The Pickle affidavit manifestly was filed in this Court, not the district court.

The Pickle affidavit was part of a motion to enlarge the record on appeal to include the matters in the affidavit. This Court entered an Order on December 4, 2009, denying the motion. The Court advised that documents not submitted to the district court prior to the appeal “are not properly considered as part of the record in this appeal.”

Appellants have now frustrated the order of Judge Saylor by filing in the

Court of Appeals documents that they were expressly forbidden to file in the district court, and have also frustrated the order of *this* Court which denied the Appellants' motion to enlarge the record on appeal. The first time around, Appellants understood perfectly well that if they wanted to expand the record on appeal, they had to file a motion under Fed. R. App. P. 10(e). They did so, and lost their motion. This time around, they disguised their motion to expand the appellate record as a motion to file the same documents under seal. They still lose.

ARGUMENT

I. Leave to File the New Exhibits and the Pickle Affidavit Should be Denied.

“The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcripts of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.” (Fed. R. App. P. 10(a)). “If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.” Fed. R. App. P. (10)(e)(1).

The exhibits contained in Appellants' supplemental appendix were excluded by order of the district court. The Pickle affidavit was never in the district court record. Thus, they are not properly part of the record on appeal.

II. Leave to File a Supplemental Brief Under Seal Should be Denied.

“If discussion of confidential material is necessary to support the motion to

seal, that discussion shall be confined to an affidavit or declaration, which may be filed provisionally under seal.” 1st Cir. R. 11.0(c)(2). “If the court of appeals denies the movant’s motion to seal, any materials tendered under provisional seal will be returned to the movant.” *Id.*

The rules of this Court do not authorize a supplemental brief relating specifically to exhibits filed under seal. *See* 1st Cir. R. 28.1 (requiring “a specific and timely motion” in order to have a brief sealed). Thus, there is no authority for the Appellants’ supplemental brief and it must be stricken.

Further, Appellants’ word count certificate for their primary brief indicates its length is 13,982 words -- 18 words shy of the limit. *See* 1st Cir. R. 32(7)(B) (limiting principal brief to 14,000 words). The supplemental brief, except for the first 18 words, puts Appellants over their limit. This provides an additional basis to reject the supplemental brief.

III. Appellants Should be Sanctioned.

“When any party to a proceeding before this court...files a motion, brief, or other document that is frivolous or interposed for an improper purpose, such as to harass or to cause unnecessary delay, or unreasonably or vexatiously increases litigation costs, the court may, on its own motion, or on motion of a party, impose appropriate sanctions on the offending party....” 1st Cir. R. 38.0.

In its order entered December 4, 2009, this Court told the Appellants that the

record on appeal would be limited to documents that had been submitted to the district court before the appeal was filed. Appellants understood this basic tenet of appellate practice, as evidenced by the fact that they brought a motion to enlarge the record in their first appeal.

Now, however, they have attempted to circumvent Judge Saylor and this Court by filing documents that unless rejected, will enlarge the record on appeal. There is no possibility that Appellants failed to understand that what they were doing was improper. They were told not to file these documents first by Judge Saylor, then by this Court, and finally, repeatedly, by the undersigned. (*See* email exchanges attached to Affidavit of Robert Pickle [dated 12/3/2010] at Ex. A). Moreover, instead of asking permission to file the confidential materials, appellants have already cited to and discussed the existence of these materials in their appellate brief. Appellants' conduct in bringing a disguised version of a motion that this Court had previously denied merits sanctions. Appellants should be directed to pay Appellees' reasonable attorneys' fees related to this motion, in an amount to be established by affidavit.

CONCLUSION

In summary, Appellees respectfully ask this Court to deny Appellants' Motion to File Under Seal, and further request they be awarded their attorneys' fees in connection with this motion.

Respectfully submitted,

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By s/ M. Gregory Simpson

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