IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-10309

United States Court of Appeals
Fifth Circuit
FILED
July 11, 2014
Lyle W. Cayce
Clerk

JACQUELINE WILSON, Whose Death Has Been Suggested,

Plaintiff

BILLY BOB WILSON, Substituted on Behalf of Jacqueline Wilson, Deceased; CAROLINE JEAN WILSON, Substituted on Behalf of Jacqueline Wilson, Deceased,

Appellants

v.

NOVARTIS PHARMACEUTICALS CORPORATION,

Defendant – Appellee

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 4:12-CV-684

Before SMITH, DeMOSS, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Appellants Billy and Caroline Wilson appeal the district court's orders vacating a prior substitution order, dismissing the case pursuant to Rule 25(a),

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and denying Appellants' Rule 59(e) motion to alter or amend the judgment. For the following reasons, we affirm the district court's orders.

I.

In January 2006, Jacqueline Wilson filed this products liability suit against Appellee Novartis Pharmaceuticals Corporation ("Novartis"). Jacqueline died while the case was in multidistrict litigation ("MDL"). On February 1, 2008, counsel for Jacqueline's children, Billy and Caroline, filed a suggestion of death in which counsel represented that Billy and Caroline were the "personal representatives" of their mother's estate. On May 7, 2008, counsel filed a motion for substitution in which counsel again represented that Billy and Caroline were the "personal representatives" of the estate. The MDL court granted the motion for substitution in reliance on counsel's representations. In October 2012, after the case was transferred from the MDL court to the Northern District of Texas, the district court issued an order requiring Billy and Caroline to file proof of their status as personal representatives of their mother's estate. Billy and Caroline filed two motions for extensions of time to file proof, which the district court granted. In their third motion for an extension of time, Billy and Caroline acknowledged that they had never been appointed personal representatives of their mother's estate.

On December 19, 2012, the district court issued an order vacating the 2008 substitution order pursuant to its inherent authority to sanction abusive litigation practices. The district court found that Billy and Caroline, through counsel, twice misrepresented to the court that they were the personal representatives of their mother's estate (in the suggestion of death and motion for substitution), obtained the 2008 substitution order "through deception" on the court, and then litigated the case for five years without legal authority to represent the estate. The court further gave the parties one month to file

"whatever motion or other document they thought to be appropriate considering the rulings made by the court."

Billy and Caroline filed a motion to vacate the court's December 19 sanction order. Novartis filed a motion to dismiss the case under Federal Rule of Civil Procedure 25(a). The district court denied Billy and Caroline's motion to vacate the December 19 sanction order. The district court then granted Novartis's motion to dismiss under Rule 25(a) on the ground that—five years after the suggestion of death—there was no plaintiff in the case and no pending motion for substitution. Billy and Caroline subsequently filed a Rule 59(e) motion to alter or amend judgment, which the district court denied. Billy and Caroline timely appealed.[1]

II.

Appellants contend that the district court abused its discretion in sanctioning them by vacating the 2008 substitution order. "A district court has the inherent authority to impose sanctions 'in order to control the litigation before it.'" *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 619 F.3d 458, 460 (5th Cir. 2010) (citation omitted); *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1417 (5th Cir. 1995). This inherent authority includes the power to sanction "abusive litigation practices." *In re Stone*, 986 F.2d 898, 902 (5th Cir. 1993). "Because of their very potency, inherent powers must be exercised with

[1] As a preliminary matter, Novartis contends that Appellants should be judicially estopped from claiming that this case satisfies the amount-in-controversy requirement for diversity jurisdiction based on Appellants' representations in a Texas muniment of title application. Assuming that judicial estoppel applies in the subject-matter-jurisdiction context, *cf. In re Sw. Bell Tel. Co.*, 535 F.2d 859, 861 (5th Cir. 1976), *rev'd on other grounds*, *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723 (1977); *Lara v. Trominski*, 216 F.3d 487, 495 n.9 (5th Cir. 2000), we decline to invoke judicial estoppel in this case. The statements in question are not "plainly inconsistent," and any inconsistency appears to have been "inadvertent." *See Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc) (setting forth the elements for judicial estoppel); *see also Cont'l Cas. Co. v. McAllen Indep. Sch. Dist.*, 850 F.2d 1044, 1046 (5th Cir. 1988).

restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Accordingly, "[t]his court has held that such sanctions should be confined to instances of 'bad faith or willful abuse of the judicial process.'" *Woodson*, 57 F.3d at 1417.

"We review a court's imposition of sanctions under its inherent power for abuse of discretion." *Chambers*, 501 U.S. at 55; *Tollett v. City of Kemah*, 285 F.3d 357, 363 (5th Cir. 2002). "An abuse of discretion occurs where the 'ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence.'" *Tollett*, 285 F.3d at 363 (citation omitted).

Appellants have not shown that the district court abused its discretion in vacating the 2008 substitution order. The MDL court's Case Management Order ("CMO") set forth detailed procedures for the substitution of parties and put counsel on notice that the status of "personal representative" of an estate could require "the opening of an estate" and formal "appointment" under applicable state law. The CMO required counsel "to initiate or cause to be initiated proceedings" for the appointment of a personal representative within thirty days of the plaintiff's death. The CMO further required counsel to file a motion for substitution within ninety days of filing the suggestion of death. Finally, the CMO warned that failure to comply could result in dismissal in accordance with Rule 25(a). Counsel expressed an awareness of the requirements of the CMO and Rule 25(a) in the suggestion of death.

Despite this awareness, counsel violated the CMO by failing to initiate proceedings for the appointment of a personal representative within thirty days of Jacqueline Wilson's death and by filing a motion for substitution after the ninety-day deadline. Counsel further falsely represented to the court that Appellants were the "personal representatives" of their mother's estate in two filings—the suggestion of death and motion for substitution. Counsel made these representations when in fact Appellants had never been appointed

personal representatives of their mother's estate; nor had counsel initiated proceedings for appointment. The MDL court issued its 2008 substitution order in reliance on counsel's false representations. Counsel then litigated the case on behalf of Appellants for five years, through discovery and summary judgment, without legal authority to represent the estate. On this record, we cannot say that the district court abused its discretion in vacating the 2008 substitution order.[2]

III.

Appellants next contend that the district court erred in dismissing the case pursuant to Rule 25(a). We review the district court's interpretation of the Federal Rules of Civil Procedure *de novo*. *See Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Mich.*, 97 F.3d 822, 827 (5th Cir. 1996). Rule 25(a)(1) provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party." Fed. R. Civ. P. 25(a)(1). Rule 25(a)(1) further provides that "[i]f the motion [for substitution] is not made within 90 days after service of the statement noting the death, the action by or against the decedent must be dismissed." *Id.*

We conclude that the district court did not err in dismissing the case pursuant to Rule 25(a) where there was no plaintiff in the case and no pending motion for substitution five years after the suggestion of death. As discussed above, the district court properly vacated the 2008 substitution order that was issued in reliance on counsel's misrepresentations. Following this ruling, there was no plaintiff in the case to continue the litigation. Nor had there been a proper plaintiff in the case for the past five years. The court gave Appellants

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[2] *See, e.g.*, *Johnson v. Hankook Tire Am. Corp.*, 449 F. App'x 329, 334 (5th Cir. 2011) (upholding sanctions imposed for misrepresentations to the court); *Crowe v. Smith*, 151 F.3d 217, 239 (5th Cir. 1998) (same); *United States v. Reed*, 106 F.3d 396 (5th Cir. 1997) (same); *see also Diehl v. United States*, 438 F.2d 705, 709 (5th Cir. 1971) (affirming the vacatur of a substitution order obtained through misrepresentations).

one month to file any motions they deemed appropriate. Appellants did not file a motion for an extension of the ninety-day deadline to file a legally proper motion for substitution. Instead, Appellants filed a motion to vacate the December 19 sanction order, challenging the district court's authority to issue the order. As the district court observed, Appellants chose "to stand or fall" on the 2008 substitution order, which had been vacated. We perceive no error in the district court's dismissal of the case in these circumstances.

IV.

Finally, Appellants do not offer any arguments or cite any authority in their briefs to challenge the district court's denial of their Rule 59(e) motion. Accordingly, Appellants have abandoned any challenge to this ruling on appeal. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

V.

For the foregoing reasons, the district court's judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See* FED. R. APP. P. & 5TH CIR. R. 39. Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ **v.** _____ **No.** _____

The Clerk is requested to tax the following costs against: _____

COSTS TAXABLE UNDER Fed. R. App. P. & 5th Cir. R. 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket Fee ($450.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
				Total $ _____				Costs are taxed in the amount of $ _____

Costs are hereby taxed in the amount of $ _____ **this** _____ **day of** _____, _____.

LYLE W. CAYCE, CLERK

State of
County of _____

By _____
Deputy Clerk

I _____, **do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This** _____ **day of** _____, _____.

_____
(Signature)

***SEE REVERSE SIDE FOR RULES GOVERNING TAXATION OF COSTS**

Attorney for _____

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than $0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5TH CIR. R. 32.2.3that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5TH CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) ***Against Whom Assessed.*** The following rules apply unless the law provides or the court orders otherwise;

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) ***Costs For and Against the United States.*** Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

©) ***Costs of Copies*** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) ***Bill of costs: Objections; Insertion in Mandate.***

(1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk's request – add the statement of costs, or any amendment of it, to the mandate.

(e) ***Costs of Appeal Taxable in the District Court.*** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

July 11, 2014

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 13-10309 Jacqueline Wilson, et al v. Novartis Pharmaceuticals Corp.
USDC No. 4:12-CV-684

Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Should a rehearing be pursued, we call your attention to the following guidelines for record citations.

Important notice regarding citations to the record on appeal to comply with the recent amendment to 5TH CIR. R. 28.2.2.

Parties are directed to use the new ROA citation format in 5TH CIR. R. 28.2.2 **only** for electronic records on appeal with pagination that includes the case number followed by a page number, in the

format "YY-NNNNN.###". In single record cases, the party will use the shorthand "ROA.###" to identify the page of the record referenced. For multi-record cases, the parties will have to identify which record is cited by using the entire format (for example, ROA.YY-NNNNN.###).

Parties may not use the new citation formats for USCA5 paginated records. For those records, parties must cite to the record using the USCA5 volume and or page number.

In cases with both pagination formats, parties must use the citation format corresponding to the type of record cited.

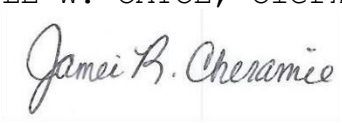
Explanation: In 2013, the court adopted the Electronic Record on Appeal (EROA) as the official record on appeal for all cases in which the district court created the record on appeal on or after 4 August 2013. Records on appeal created on or after that date are paginated using the format YY-NNNNN.###. The records on appeal in some cases contain both new and old pagination formats, requiring us to adopt the procedures above until fully transitioned to the EROA.

The recent amendment to 5TH CIR. R. 28.2.2 was adopted to permit a court developed computer program to automatically insert hyperlinks into briefs and other documents citing new EROA records using the new pagination format. This program provides judges a ready link to pages in the EROA cited by parties. The court intended the new citation format for use **only** with records using the new EROA pagination format, but the Clerk's Office failed to explain this limitation in earlier announcements.

The judgment entered provides that appellants pay to appellee the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Jamei R. Cheramie, Deputy Clerk

Enclosure(s)

Mr. Aaron Douglas Davidson
Mr. Eric Gordon Lasker
Ms. Katharine Ruth Latimer
Mr. Donald Robertson McMinn
Mr. Daniel Adam Osborn