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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACY CAEKAERT, and CAMILLIA MAPLEY, Plaintiffs – Appellees, vs. PHILIP BRUMLEY, Appellant, and WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., and BRUCE MAPLEY, Sr. Defendants,	No. 23-35329 D.C. No. CV-20-52-BLG-SPW U.S. District Court for Montana, Billings **APPELEES' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION AND FOR SANCTIONS**

COMES NOW, Plaintiffs/Appellees Tracy Caekaert and Camillia Mapley, by and through undersigned counsel, and hereby respectfully submit this Reply Brief in Support of Their Motion to Dismiss for Lack of Appellate Jurisdiction and for Sanctions.

DAVID V. HOOKER DOES NOT CONTROL THIS CASE

Appellant Philip Brumley, Esq.'s heavy reliance on *David v. Hooker* is misplaced. 560 F.2d 412 (9th Cir. 1977). *David* involved Rule 37 sanctions levied against a non-attorney for discovery violations. *Id.* at 414–15. In stark contrast, this case is about sanctions levied against an attorney under 28 U.S.C § 1927 because he chose to submit misleading statements to the district court on behalf of his client, WTPA. The difference between the cases matters. The *David* court reached its decision that Rule 37 sanctions were immediately appealable because, *inter alia*, Rule 37 did not include language that a party and its non-attorney officer were to be treated as identical entities. *Id.* at 417. But here, Mr. Brumley is WTPA's attorney, and he was acting on behalf of WTPA when he chose to submit misleading affidavits to the district court.

As the *Cunningham* court noted, there is a distinction between a party's attorney who is sanctioned for conduct on behalf of his client, like Mr. Brumley, and non-party witnesses:

> Petitioner's argument suffers from at least two flaws. It ignores the identity of interests between the attorney and client. Unlike witnesses, whose interests may differ substantially from the parties', attorneys assume an ethical obligation to serve their clients' interests. This obligation remains even where the attorney might have a personal interest in seeking vindication from the sanctions order. . . . The effective congruence of interests between clients and attorneys counsels against treating attorneys like other nonparties for purposes of appeal.

Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 206–07 (1999) (internal citations omitted) (citing cases). Justice Kennedy in his concurrence likewise noted that congruence of interest between a party and their attorneys was of critical importance: "In addition, if a contempt order is entered and there is no congruence of interests between the person subject to the order and a party to the underlying litigation, the order may be appealable." *Id.* at 211.

Here, there is a complete congruence of interests between Mr. Brumley and WTPA. Mr. Brumley has been WTPA's general counsel and acting on its behalf for 35 years, and he was doing so when he chose to submit a misleading affidavit to the district court in an effort to get the case against his client dismissed. In short, Mr. Brumley has an "identity of interest" with his client, WTPA.[1] The Supreme Court already decided such relationship is categorically different than other non-party witnesses like the non-attorney officer in *David*, or the non-party expert witness in *Sali*. *Sali v. Corona Reg'l Med. Ctr.,* 884 F.3d 1218 (9th Cir. 2018).[2]

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[1] Contrary to Mr. Brumley's criticism, it is not "misleading" to state that Mr. Brumley's client is WTPA. (Opposition to Mot. at 6, n. 2). It is undisputed that he is WTPA's lawyer; it is undisputed that he chose to insert himself into this litigation by submitting an affidavit on behalf of his client; and there is no evidence that he took his "lawyer hat" off when he did so.

[2] While Mr. Brumley is apparently relying on *Sali*, the Court there actually found *David* inapplicable because the sanctions being appealed (after final judgment)

MR. BRUMLEY'S ATTEMPT TO TURN HIMSELF INTO A NON-ATTORNEY WITNESS IS NOT SUPPORTED BY ANY FACTS

Mr. Brumley asks this Court to conclude that he is like the non-attorney officer in *David*. But there is no evidence that Mr. Brumley is an officer of WTPA or drafted and submitted his affidavit to the district court as an "officer" of WTPA. Mr. Brumley's several affidavits affirm his position as WTPA's lawyer, sets forth certain facts he believed would assist his client, and he signed the affidavit as "Philip Brumley, Esq." (District Court Clerk's Record (hereinafter "C.R."), Doc. 14-1; Doc. 26). His declaration to this Court again confirms he is WTPA's lawyer and says nothing to indicate he was acting as anything but. (Decl. of Philip Brumley at ¶ 2).

Indeed, the entire point of Mr. Brumley's misleading affidavit was to convince the district court to dismiss his client from civil liability in Montana. To do so, Mr. Brumley relied on his expertise as a lawyer to set forth certain facts related to the jurisdictional analysis that he believed advantaged his client. For instance:

- Mr. Brumley swore that WTPA had no contact with congregations of Jehovah's Witnesses in Montana;

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were issued against attorneys—not some non-party—for their expert witness's failure to attend a deposition. 884 F.3d at 1221, n. 3.

- Mr. Brumley swore that WTPA did not establish or disseminate policies to congregations of Jehovah's Witnesses in Montana; and
- Mr. Brumley swore that WTPA does not author, publish, or print various Jehovah's Witnesses publications.

(C.R., Doc. 14-1 at ¶¶ 10–16).

It was not "mere happenstance" that Mr. Brumley is WTPA's lawyer as he now argues. (Opposition to Mot. at 9). Mr. Brumley has submitted multiple sworn statements to the district court, and another sworn statement to this court, and he has never asserted that he is doing so as an "officer" of WTPA. Instead, the record in each instance is plain: he is acting as WTPA's lawyer. There is no basis in the record to conclude that Mr. Brumley was acting in any role other than that of lawyer for WTPA when he submitted his misleading affidavit. Just like every other attorney sanctioned post-*Cunningham*, he can appeal his sanctions with his client when the case reaches final resolution.

CUNNINGHAM DOES NOT DISTINGUISH BETWEEN "COUNSEL OF RECORD" AND COUNSEL

Mr. Brumley attempts to narrow the holding in *Cunningham* so that it applies only to "counsel of record." (Opposition to Mot. at 3, 5–9). But *Cunningham* makes no distinction between counsel of record and a party's other attorneys. *Cunningham* states: "This case presents the question whether an order imposing sanctions on an attorney pursuant to Federal Rule of Civil Procedure

37(a)(4) is a final decision. We hold that it is not, even where, as here, the attorney no longer represents a party in the case." 527 U.S. at 200. The opinion concluded by stating "For the foregoing reasons, we conclude that a sanctions order imposed on an attorney is not a 'final decision' under § 1291[.]" *Id.* at 210. The holding in *Cunningham*, which by its own terms applies to attorneys who are not "counsel of record" during the appellate process, requires Mr. Brumley and his client to wait until a final judgment is entered before appealing the district court's sanctions order.

MARTINEZ **DOES NOT CONTROL**

Mr. Brumley's reliance on the out-of-circuit *Martinez* case is misplaced. (Opposition to Mot. at 7 (citing *Martinez v. City of Chicago*, 823 F.3d 1050, 1053 (7th Cir. 2016)). The *Martinez* court said nothing about whether attorney sanctions were immediately appealable or not.[3] Rather, the issue for the *Martinez* court to decide was "whether an order by a district court imposing a sanction on a lawyer for misconduct in a case before the court can *ever* be appealed if the sanction lacks a monetary component." *Id.* at 1051 (original emphasis). The *Martinez* holding does not assist this Court in determining whether sanctions against Mr. Brumley

[3] In fact, the case at the district court had reached final resolution by an accepted offer of judgment, and only after were sanctions issued due to an attorney's participation in concealing material evidence during discovery. *Martinez*, 823 F.3d at 1051–53.

are immediately appealable. Rather, under the binding law of this Circuit, attorneys like Mr. Brumley who engage in sanctionable conduct on behalf of their clients must wait to appeal those sanctions until the conclusion of the case.

DATED this 12th day of June, 2023.

By: /s/ Ryan Shaffer
Ryan R. Shaffer
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Attorneys for Plaintiffs/Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing **APPELEES' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION AND FOR SANCTIONS** complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(a)(A) because it contains 1,313 words and the typeface and type style requirements of Federal Rules of Appellate Procedure 27(d)(a)(E) because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman typeface.

By: /s/ Ryan Shaffer
Ryan R. Shaffer

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2023, the forgoing **A APPELEES' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION AND FOR SANCTIONS** was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: /s/ Ryan Shaffer
Ryan R. Shaffer