No. 23-35329

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACY CAEKAERT and CAMILLIA MAPLEY,
Plaintiffs-Appellees,

v.

PHILIP BRUMLEY,
Appellant,

and

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.;
WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA,
Defendants.

On appeal from the United States District Court
District of Montana No. CV-20-52-BLG-SPW
The Honorable Susan P. Watters

OPPOSITION TO MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION AND FOR SANCTIONS; DECLARATION OF APPELLANT PHILIP BRUMLEY

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INTRODUCTION

Appellant Philip Brumley is not a party to this litigation, nor is he counsel of record representing any party in this litigation—nor could he be, given that he is not admitted to the District of Montana. Instead, Brumley is the in-house General Counsel of one of the defendants, Watch Tower Bible and Tract Society of Pennsylvania (WTPA). During this litigation, acting in his capacity as WTPA's representative on jurisdictional issues, Brumley signed two affidavits, prepared with the assistance and advice of WTPA's counsel in the litigation. Based on his signing factual affidavits for WTPA, the district court sanctioned Brumley personally for over $150,000 under 28 U.S.C. § 1927 (first enacted in 1813). Brumley now appeals that order.

The order on appeal is unprecedented. Section 1927 is a statute empowering courts to sanction an "attorney" who "unreasonably and vexatiously" "multiplies the proceedings" in a case. Section 1927 is designed to allow a court to sanction lawyers who are acting as counsel in a case pending before the court. Section 1927 was never intended to allow a fact witness or party representative—who merely also happens to be a lawyer—to be sanctioned. Neither the district court nor the Plaintiffs identified any case in which a court imposed § 1927 sanctions under such circumstances, i.e., against a non-party, non-counsel of record, who never appeared in the case (as party or counsel) and who is not even admitted to practice before the sanctioning court. Thus, Brumley's appeal from the district court's sanctions order raises an important legal question of first impression.[1]

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[1] The order on appeal is unprecedented because it is contrary to the plain language of § 1927 and case law interpreting it. *See F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir. 1986) (vacating § 1927 sanctions because "Section 1927 does not authorize recovery from a party or an employee, but '*only* from an attorney or otherwise admitted representative of a party.'"); *Sneller v. City of Bainbridge Island*, 606 F.3d 636, 640 (9th Cir. 2010) (overturning an award of

Brumley's appeal also arguably raises a novel question of appellate jurisdiction. The immediate appealability of sanctions orders is a tricky and underdeveloped area. Despite a few clear guideposts, in many situations appealability is unclear. Thus, as detailed below, federal appellate practice guides recommend filing appeals to avoid jurisdictional waivers.

As pointed out in the Plaintiffs' motion to dismiss Brumley's appeal, precedent from this Court, *Stanley v. Woodford*, 449 F.3d 1060 (9th Cir. 2006), holds that a lawyer cannot immediately appeal sanctions imposed under § 1927 when the sanctions arose from the lawyer's conduct in acting as counsel of record in the litigation. But *Stanley* does not address Brumley's situation—indeed, no court has. Similarly, as also pointed out in Plaintiffs' motion, the United States Supreme Court, in *Cunningham v. Hamilton County*, 527 U.S. 198 (1999), has held that discovery sanctions against counsel of record are not immediately appealable. But again, that is not Brumley's situation. As noted, there is no precedent that squarely addresses a sanctions order under circumstances like Brumley's. Further, this Court has held that a non-party can immediately appeal a sanctions order. *See David v. Hooker, Ltd*., 560 F.2d 412, 415 (9th Cir. 1977). As a non-party, Brumley's appeal is most analogous to that law.

This Court should rule that someone in Brumley's situation has a right to an immediate appeal. At the very least, Brumley's appeal has been taken in good

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sanctions under § 1927 because "[t]he sanction here was imposed jointly on counsel and the client, but § 1927 authorizes sanctions only upon counsel."); *see also Matta v. May*, 118 F.3d 410, 414 (5th Cir. 1997); *Manez v. Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 585 (7th Cir. 2008); *AF Holdings LLC v. Navasca*, No. C-12-2396-EMC, 2013 WL 5701104, at *2 (N.D. Cal. Oct. 16, 2013); *Lowery v. Cnty. of Riley*, 738 F. Supp. 2d 1159, 1170 (D. Kan. 2010); *Leventhal v. New Valley Corp*., 148 F.R.D. 109 (S.D.N.Y. 1993); *Popa-Verdecia v. Marco Trucking, Inc.*, No. 8:18-CV-1869-T-02AEP, 2019 WL 527974, at *1 (M.D. Fla. Feb. 11, 2019).

faith, pursuant to primary and secondary authority, and therefore is not frivolous or sanctionable.

STATEMENT OF FACTS

In response to Plaintiffs' complaint, Defendant WTPA filed a motion to dismiss the case for lack of personal jurisdiction. (Dkt. No. 13.) To support the motion, WTPA attached an affidavit signed by Brumley, its in-house General Counsel. (Dkt. No. 14-1.) That affidavit made several statements indicating that WTPA had no contacts with Montana. (Dkt. No. 14-1.)

Plaintiffs disagreed with the affidavit's assertions and submitted documentary evidence attempting to dispute them. (Dkt. No. 21.) WTPA then filed a second affidavit, also signed by Brumley, in which he stated that the documents presented did not invalidate his earlier statements. (Dkt. No. 26.) The district court reserved ruling on WTPA's motion and provided the parties an opportunity to conduct jurisdictional discovery. (Dkt. No. 32.)

After jurisdictional discovery and related motion practice, WTPA withdrew its motion to dismiss. (*See* Dkt. No. 94; Dkt. No. 135 at 3.) Specifically, Plaintiffs demanded that WTPA withdraw its motion to dismiss under the safe harbor provision of Federal Rule of Civil Procedure 11(c), which WTPA then agreed to do. (*See* Dkt. No. 94; Dkt. No. 135 at 5–6.) Despite having thereby prevailed on the motion to dismiss—and after having successfully convinced its opposing party, WTPA, to withdraw its motion—Plaintiffs moved for sanctions personally against Brumley under 28 U.S.C. § 1927 and the district court's inherent authority. (Dkt. No. 101.) Plaintiffs did not attempt to seek sanctions against WTPA, including under the court's inherent powers, presumably because they had convinced WTPA to use the safe harbor provision. (*See generally id.*)

The district court expressly denied sanctions under its inherent authority, but granted sanctions under § 1927. (Dkt. No. 135.) Thereafter, the district court

awarded Plaintiffs sanctions of $154,448.11 against Brumley personally. (Dkt. No. 219.) The district court entered the sanctions award in conjunction with a similar, related case proceeding in parallel with this action. (D. Mont. No. 1:20-cv-00059-SPW, Dkt. No. 175; 9th Cir. Case No. 23-35330.) Thus, by virtue of having signed affidavits on behalf of a party, Brumley became liable for over $150,000 in sanctions. (Under a reservation of rights, and to avoid the running of interest, Brumley has paid the sanctions. (*See* Dkt. No. 227.))

ARGUMENT

I. This Court has jurisdiction over Brumley's appeal because he is a non-party, non-attorney of record.

In *David v. Hooker, Ltd.*, 560 F.2d 412, 415 (9th Cir. 1977), this Court held that an officer, director, or managing agent of a party would be treated as a non-party, and that sanctions imposed against such a non-party under Federal Rule of Civil Procedure 37(b)(2) were "a final decision so as to be appealable to this court." In so concluding, this Court explained that '"the requirement of finality is to be given a 'practical rather than technical construction.' . . . the most important considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Id.* at 416–17 (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152–53 (1964)). With respect to the sanctions award, this Court reasoned that "the non-party cannot argue the propriety of the Rule 37(b)(2) sanction for attorney's fees in an appeal from the final judgment as a party to the suit would be able to do. Unless he can obtain a review of the order and sanction at the time it is imposed, a non-party will have no right of review at all." *Id.* at 417. Therefore, "[t]here is no danger of piecemeal review in this type of case as such orders are, for all practical purposes, final." *Id.*

David has never been overruled by this Court or the Supreme Court, yet Plaintiffs' motion fails to mention it. Indeed, this Court invoked the rule from *David* as recently as 2018. *See Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1221 n.3 (9th Cir. 2018) (noting that while a sanctions order is interlocutory and non-appealable until entry of final judgment, "certain exceptions are recognized in cases involving orders and sanctions against non-parties" (quoting *David*, 560 F.2d at 415)). Instead, Plaintiffs rely on case law holding that a party's attorney-of-record (or former attorney-of-record) cannot immediately appeal sanctions imposed under Rule of Civil Procedure 37(a)(4), *see Cunningham*, 527 U.S. at 198, and that an attorney petitioning to be a party's attorney-of-record cannot immediately appeal a § 1927 sanctions order, *see Stanley*, 449 F.3d at 1060. Neither case is applicable to Brumley, and neither forecloses Brumley's appeal here.

Brumley is not a party to the underlying case in the district court. Brumley also has never been a party's attorney in the case (and never sought to be). (Declaration of Philip Brumley ¶¶ 3–5.)[2] In fact, Brumley is not even admitted to practice in Montana (in state or federal court)—or in any jurisdiction within the Ninth Circuit.[3] (Dkt. No. 165-3 at 2; Declaration of Philip Brumley ¶¶ 8–9.) Instead, Brumley is an officer of WTPA as its General Counsel. (Dkt. No. 165-3

[2] Plaintiffs' statement of facts asserts that WTPA was Brumley's "client" (Mtn. at 6), but that is imprecise to the point of being misleading. While Brumley has an attorney-client relationship with WTPA as its General Counsel, he has never filed any papers on behalf of WTPA because he is not trial counsel for WTPA in this litigation. Rather, WTPA has always appeared through counsel of record—admitted to practice before the district court (unlike Brumley)—and that counsel has filed all papers in this litigation.

[3] Nor has Brumley ever sought or obtained permission to appear as counsel in the District of Montana *pro hac vice*. (Declaration of Philip Brumley ¶¶ 3–4, 10.)

at 2–3; Declaration of Philip Brumley ¶ 2.) Brumley has never appeared in this case—other than to file a notice of appeal after the district court issued an order sanctioning him personally—nor has he ever appeared in a case in the District of Montana or this Court. (Dkt. No. 165-3 at 2; Declaration of Philip Brumley ¶¶ 3–10.)

Under *David*, Brumley should be treated as a non-party, and should be entitled to appeal the significant § 1927 sanctions awarded against him. Without the opportunity now, Brumley runs the risk that he could never challenge the sanctions award. Tellingly, Plaintiffs' motion never states that Brumley could file an appeal later, which suggests they could take the position when this case finally resolves (currently in discovery and set for trial in late 2024), that Brumley is not a party and would not be entitled to appeal his collateral sanctions order from the litigation's final judgment—which would not name him.

Filing an immediate appeal and vacating the sanctions award as quickly as possible is also necessary in light of the significant prejudice that Brumley faces. While the sanctions have no basis in law, Brumley has been forced to pay over $150,000. Other Circuits have further held that a finding of attorney misconduct in a sanctions order (i.e., a non-monetary sanction) can rise to the level of warranting an immediate appeal, as such findings "can seriously impair an attorney's professional standing, reputation, and earning possibilities." *See Martinez v. City of Chicago*, 823 F.3d 1050, 1053 (7th Cir. 2016).

II. Brumley's appeal is not frivolous because *Cunningham* and *Stanley* do not foreclose jurisdiction over this appeal.

Federal Rule of Appellate Procedure 38 authorizes this Court to impose sanctions if an appeal is frivolous. "An appeal is frivolous if the result is obvious or if the claims of error are wholly without merit." *In re Westwood Plaza N.*, 889 F.3d 975, 977 (9th Cir. 2018). Plaintiffs offer no defense to the merits of

the district court's order, presumably because no authority supports imposing sanctions under § 1927 against a non-counsel of record. Instead they repeat their argument that *Cunningham* and *Stanley* foreclose an immediate appeal of such a defective order. But as noted above, that argument fails.

Filing an immediate appeal was the prudent course of action for Brumley because if he did not, then he might never be able to challenge the sanctions in an appeal from the case's final judgment as a party to the suit would be able to do. *See David*, 560 F.2d at 415. As noted, "[u]nless he can obtain a review of the order and sanction at the time it is imposed, a non-party will have no right of review at all." *See id.*

Plaintiffs' motion asserts that *Stanley* ruled with "unmistakable clarity, that § 1927 sanctions are not immediately appealable." (Mtn. at 8.) This characterization is a gross over-simplification. For example, a leading treatise's "Practice Pointer" recommends that non-parties file an immediate appeal in this situation: "until the Ninth Circuit interprets and applies *Cunningham* in other contexts, ***prudence suggests that practitioners continue to assume that other nonparties must directly appeal such sanctions awards***. ***File an immediate notice of appeal***; but keep in mind that the interlocutory appeal may be dismissed (under *Cunningham*), in which case a new appeal would have to be filed after a final judgment is rendered in the litigation." Goelz, Batalden & Querio, Federal Ninth Circuit Civil Appellate Practice § 2:458 (The Rutter Group 2023) (emphasis added).[4] Following the instructions of a leading treatise, which acknowledges the

[4] Similarly, the practice guide notes that while *Cunningham* "calls [*David*] into question," there is no definitive answer on the appealability by "officers, directors, [and] agents of [a] corporate party." Goelz et al., at § 2:457. See also, the 2019 edition of § 2:446 ("the right of a nonparty—and particularly nonparty attorneys—to an interlocutory appeal from *other types of sanctions*, not arising out of contempt proceedings is **presently unclear**." (bold added)).

uncertainty of the law in this area, cannot be deemed "wholly without merit." *See In re Westwood Plaza N.*, 889 F.3d at 977. Accordingly, sanctions are inappropriate.

In an apparent nod to the fact that Brumley's situation here does not square with either *Cunningham* or *Stanley*, Plaintiffs argue that Brumley's status as WTPA's General Counsel as opposed to WTPA's "litigation counsel" does not matter because precedent has made clear that "an attorney's continued participation in a case does not affect whether a sanctions order is 'final'" or not. (Mtn. at 10.) But this point rests on the idea that a bad-acting counsel of record should not be able to control appealability by withdrawing as counsel of record (to create a final, appealable order). That, of course, does not apply to Brumley, who never acted as counsel of record. There is no concern about Brumley strategically withdrawing as counsel because he never appeared as counsel to begin with. This merely highlights how the existing precedent—focused on attorneys who are acting as counsel of record—differs materially from the mere happenstance of a party-representative (acting under the direction of counsel) being a lawyer.

CONCLUSION

Whether district courts can sanction in-house general counsel under § 1927 is an important and unresolved legal issue that this Court should address. This Court's procedure for how to raise the issue is unclear, but filing a notice of appeal is an obvious start, and given that a leading practice guide specifically urges that approach, doing so cannot be sanctionable as frivolous.

Moreover, Plaintiffs cite no authority holding that a non-party, like Brumley, is barred from immediately appealing an order imposing sanctions under § 1927. Brumley has meaningfully distinguished the few precedents that Plaintiffs have

cited—which, again, rather than being frivolous or vexatious, is how aggrieved parties press their positions and how the law develops.

Plaintiffs' motion to dismiss and request for sanctions should be denied, and this Court should consider Brumley's appeal of the unprecedented sanctions order against him.

June 5, 2023

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: *s/Benjamin G. Shatz*
Attorneys for Appellant
Philip Brumley

CERTIFICATE OF COMPLIANCE

I certify that this opposition to a motion complies with the typeface and other requirements of Federal Rules of Appellate Procedure 32(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with a 14-point Times New Roman font and contains 2,272 words (within the 5,200 and 20 pages permitted), exclusive of exempted sections, as counted by the Microsoft Word word-processing program used to generate this brief.

June 5, 2023

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: *s/Benjamin G. Shatz*
Attorneys for Appellant
Philip Brumley

DECLARATION OF PHILIP BRUMLEY

I, Philip Brumley, declare as follows:

1. The facts stated in this declaration are based on my own personal knowledge, and are true and correct to the best of my knowledge. I would and could competently testify to these facts if called as a witness.

2. I am General Counsel for defendant Watch Tower Bible and Tract Society of Pennsylvania (WTPA).

3. I am not, and have never been, counsel of record in this appeal or in the cases below in the district court (D. Mont. Nos. 1:20-cv-00052-SPW and 1:20-cv-00059-SPW).

4. I never sought permission to appear *pro hac vice* in either district court case (D. Mont. Nos. 1:20-cv-00052-SPW and 1:20-cv-00059-SPW).

5. I am not, and have never been, a party in either district court case (D. Mont. Nos. 1:20-cv-00052-SPW and 1:20-cv-00059-SPW).

6. I submitted two affidavits in each district court case as a fact witness on WTPA's motion to dismiss on jurisdictional grounds.

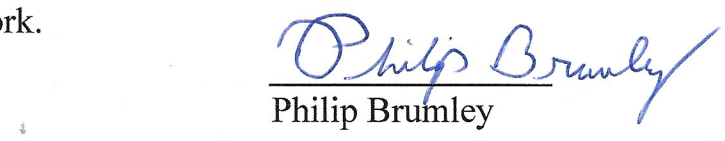
7. My only appearance was to file a notice of appeal of the sanctions orders against me at the direction of WTPA's attorneys of record.

8. I am admitted to practice law only in the State of New York and in the United States Supreme Court.

9. I am not admitted to practice law in the State of Montana, in the federal District Court of Montana, or in any federal court within the Ninth Circuit.

10. I have never appeared as an attorney of record in any case in the State of Montana or in any federal court within the Ninth Circuit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 5, 2023 at New York, New York.



Philip Brumley