No. 11-41349

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHESAPEAKE OPERATING, INC.,
Plaintiff-Appellee,
v.
WILBUR DELMAS WHITEHEAD, *d/b/a* Whitehead Production Equipment,
Defendant-Appellant.
v.
CASH FLOW EXPERTS, INC.
Defendant-Appellee.

On Appeal from the
United States District Court for the Southern District of Texas, Corpus Christi
The Hon. Nelva Gonzales Ramos, United States District Judge
District Court Number C-10-301

BRIEF FOR APPELLANT WILBUR DELMAS WHITEHEAD

Submitted by:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant, Wilbur Delmas Whitehead, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal:

FOR THE APPELLANT (Wilbur Delmas Whitehead):

1. Wilbur Delmas Whitehead, Appellant.

2. James L. Hankins, counsel in this Court for appellant Wilbur Delmas Whitehead.

3. Richard W. Rogers, III, counsel for appellant Wilbur Delmas Whitehead in the district court below.

4. Garvin A. Isaacs, Jr. (a member of the Bar of this Court), counsel for appellant Wilbur Delmas Whitehead in a pending federal criminal case styled *United States v. Whitehead*, No. 11-cr-273-M (W.D. Okla.), scheduled for jury trial on Monday, August 13, 2012.

FOR THE APPELLEE (Chesapeake Operating, Inc.)

1. Chesapeake Operating, Inc., an Oklahoma corporation.

2. Brian Kevin Tully, counsel for Chesapeake.

3. Jesse R. Pierce, counsel for Chesapeake.

FOR THE APPELLEE (Cash Flow Experts, Inc.)

1. Cash Flow Experts, Inc.

2. David H. Crago, counsel for Cash Flow.

3. Thomas F. Nye, counsel for Cash Flow.

REQUEST FOR ORAL ARGUMENT

Mr. Whitehead respectfully requests oral argument. He is on the hook for a judgment of over $3 million that was secured against him by an illegitimate process, one in which his "advocate" *literally*, in written e-mails, offered to confess summary judgment against his client; and at the bench trial in this case *literally* did not participate at all in the trial process or advocate for Whitehead in any meaningful way. Counsel believes that oral discussion of the equities in this case in relation to the Rule 60(b) standard would benefit the decision-making process of the Court.

/s/ James L. Hankins
James L. Hankins

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BRIEF FOR APPELLANT WILBUR DELMAS WHITEHEAD

STATEMENT OF JURISDICTION

This case comes to this Court as an appeal in a civil matter initiated in the district court below pursuant to 28 U.S.C. § 1332(a)(1) (Chesapeake is an Oklahoma corporation/citizen, Whitehead is a citizen of Texas, and the amount in controversy exceeded $75,000.00). Since judgment was entered against Whitehead, he now invokes the jurisdiction of this Court pursuant 28 U.S.C. § 1291 as an appeal from a final judgment of the district court entered on November 15, 2011, which denied his motion to vacate the judgment pursuant to Fed. R. Civ. Proc. 60(b). *See* ROA 1466. Whitehead filed timely a notice of appeal on December 12, 2011. ROA 1468.

ABBREVIATIONS

"ROA" refers to the district court clerk's original record on appeal followed by the page number.

"RE" refers to the Record Excerpts accompanying this Brief.

STATEMENT OF THE ISSUE

W.D. Whitehead raises a single issue in this case: it was an abuse of discretion for the district court to deny his motion to vacate the judgment pursuant to Rule 60(b).

STATEMENT OF THE CASE

This case began on September 15, 2010, when Chesapeake filed a complaint against Whitehead alleging fraud and breach of contract regarding oilfield equipment.[1] ROA 13. Chesapeake filed a motion for summary judgment on June 15, 2011; and also supplemental evidence in support on July 1, 2011. ROA 232; 486.

Whitehead, although represented by counsel, filed neither a response to the motion for summary judgment, nor participated in the discovery process in any significant way. As a result, the district court granted partial summary judgment in favor of Whitehead on its principal causes of action against Whitehead. ROA 992.

A bench trial on the remaining issues commenced on September 6, 2011, concerning primarily disputes between Chesapeake and Cash Flow over the extent of liability for the breach of contract that the district court had found that Whitehead had committed. ROA 1157. Whitehead did not participate at the trial.

In fact, on the day of trial the district court granted a joint motion for judicial notice regarding Whitehead asserting his Fifth Amendment privilege. ROA 1110. In the Order, the district court took judicial notice of the fact that Whitehead refused

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[1] Defendant-Appellee Cash Flow was added as a defendant by Chesapeake in an Amended Complaint. ROA 55. Cash Flow's involvement in this case was merely as an assignee to some of Whitehead's accounts receivable relating to the oilfield equipment at issue in this case—Cash Flow actually received the money from Chesapeake through a separate financing agreement that it had with Whitehead. The issues in this appeal concern the allegations made by Chesapeake against Whitehead.

to answer discovery requests, had not contested and would not contest the causes of action asserted against him by Chesapeake and Cash Flow, and that if called as a witness to testify at trial in the case, Whitehead would assert his Fifth Amendment right and refuse to testify. ROA 1110-1111.

In light of the fact that Whitehead did not participate in the process or contest any of the allegations, the district court issued Findings of Fact and Conclusions of Law on September 19, 2011, finding against Whitehead and in favor of Chesapeake and Cash Flow. ROA 1139. Judgment was entered against Whitehead on October 17, 2011. ROA 1377.

On October 25, 2011, Whitehead filed a motion to vacate the judgment pursuant to Rule 60(b). ROA 1380. The district court denied the motion on November 15, 2011. ROA 1466.

On December 12, 2011, Whitehead filed notice of appeal to this Court, seeking reversal of the district court's denial of his Rule 60(b) motion. ROA 1467.

STATEMENT OF THE FACTS

Chesapeake is a company located in Oklahoma City, Oklahoma, engaged in the business of oil and natural gas exploration. ROA 13, 1139. Whitehead runs a company located in Sinton, Texas, that is in the business of manufacturing and providing oilfield equipment to businesses like Chesapeake. ROA 1140.[2]

As it turned out, Whitehead manufactured a piece of oilfield equipment described technically as a "Production Skid–48" OD x 5'6" 500#ASME Code Separator 3-Phase with Controls," but referred to in the industry as a "Fat Boy" separator.[3] ROA 1142. Chesapeake needed several "Fat Boy" separators and the two entities did business that generated a significant amount of money changing hands because a "Fat Boy" separator sells for $37,454.50. ROA 1141. In fact, thirty-one "Fat Boy" separators are at issue in this case. ROA 1140-41.

Chesapeake paid invoices from Whitehead for twenty-three of the Fat Boys;

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[2] The other litigant in this case, Cash Flow, is a "factoring company" (buys accounts receivable at a discount, *see* ROA 1237-38) that got involved in this case because it advanced short-term loans to Whitehead based upon Whitehead's accounts receivables from Chesapeake. ROA 1140. When Chesapeake challenged the validity of the invoices from Whitehead, it necessarily involved Cash Flow in this litigation. However, as to the central issue for purposes of this appeal—whether Whitehead committed breach of contract or fraud by not delivering the equipment that Chesapeake paid for—Cash Flow's legal problems are intertwined with Whitehead's.

[3] The Fat Boy basically separates and measures oil, gas and water from well effluent.

and Whitehead sent invoices to Chesapeake for eight more. *Id*. This was not unusual since between June 18, 2008, and January 16, 2009, Chesapeake and Whitehead had a normal business relationship, with Whitehead producing equipment, delivering it, and Chesapeake paying for it. ROA 1192, 1201. There were no complaints. *Id*.

On or about January 16, 2009, the business relationship between Chesapeake and Whitehead soured when Chesapeake officials were apprised of "an issue" regarding the invoices for Fat Boys received by Chesapeake from Whitehead. ROA 1174, 1193 (testimony of Linda Havrilla, Director of Internal Audit for Chesapeake). The "issue" was that Chesapeake believed that it had paid Whitehead for Fat Boy separators, but the Fat Boys had not in fact been delivered. ROA 1193, 1200.

Although Chesapeake had paid the invoices for twenty-three of the Fat Boys, it did not pay for the additional eight invoices after learning of the possible issue with Whitehead. ROA 1140-41, 1176, 1233. The invoices at issue were submitted by Whitehead to the Cleburne, Texas, field office between January 16, 2009, and October 15, 2009. ROA 1179.

The invoices were signed by an employee of Chesapeake named Kyle Willey, who was the Production Foreman at the Cleburne, Texas, field office. ROA 1194-95. Kyle Willey was fired by Chesapeake on April 9, 2009. ROA 1195, 1211. Chesapeake had continued to pay invoices from Whitehead signed by Kyle Willey for

almost five months after he was fired. ROA 1195-96.

The problem was detected by Glenn Stetson. Stetson is an employee of Chesapeake with the title of "completion foreman." ROA 1210. He works out of the Cleburne, Texas, field office which operates all of the wells that Chesapeake owns in Johnson County (and a little bit of Tarrant County). *Id*. Stetson took over there when Kyle Willey was fired, but he noticed that the invoices from Whitehead still had Kyle's signature on them at a time subsequent to the date that Kyle had been fired. ROA 1217. This is how the inquiry began.

According to officials at Chesapeake, including Glenn Stetson, they hired a company called Contek Solutions to conduct an inventory of the wells owned by Chesapeake in Johnson County, Texas, to see if there were any Fat Boy separators provided by Whitehead. ROA 1179-80. There were none.[4] ROA 252, 1180.

Based upon this investigation, Chesapeake initiated the lawsuit in the district court on September 15, 2010, by filing a federal complaint against Whitehead. ROA 13. The end result was partial summary judgment against Whitehead, an uncontested bench trial, and a judgment against Whitehead of over $3 million.

How did this happen to W.D. Whitehead? It happened because his lawyer–Mr.

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[4] Stetson testified at the bench trial Contek Solutions did find some smaller separators that had been provided by Whitehead, but none of them were the "Fat Boy" type described in the invoices. ROA 1221.

Richard W. Rogers, III, who represented Whitehead on a misdemeanor DWI charge (ROA 217)–actively assisted Chesapeake in securing the judgment, and failed to investigate the case, or to present any sort of factual defense to the allegations, choosing instead to invoke the Fifth Amendment. It started with the discovery process.

Chesapeake filed the lawsuit on September 15, 2010. Rather than commence to defending the case, Rogers did nothing. He failed to participate in discovery depositions, or to file discovery requests on behalf of Whitehead. ROA 899. All that time, Chesapeake and Cash Flow actively pursued their respective legal interests, culminating in a lengthy motion for summary judgment filed by Chesapeake. ROA 232. This motion–202 pages with the attached exhibits–set forth Chesapeake's allegations against Whitehead and factual support. Rogers did not file a response to it. Rather, on June 29, 2011, he sent out an e-mail that said the following:

> Mr. Whitehead has instructed me to not contest Cash Flow's motion for summary judgment or file any pleading in response. He has also instructed me that he will not contest any Chesapeake motion for summary judgment or file any pleading in response.
>
> Mr. Whitehead also continues to assert his 5th Amendment rights and is unwilling to participate in discovery or mediation

ROA 899. In fact, Rogers went further than just asserting that Whitehead would not participate in the process, he actively agreed to an order for summary judgment

against his client, rather than simply not contesting it. This position was stated clearly in another e-mail sent out on July 1, 2011:

> I am ready to sign off on an agreed order for summary judgment against my clients. This might facilitate your mediation if the issue is resolved.

ROA 900. Based upon the fact that Whitehead, through counsel, was not contesting the allegations–and indeed was willing to agree to them–the district court, of course, had no problem in granting summary judgment (in part) against Whitehead on the principal claims brought by Chesapeake. ROA 992.

In the Memorandum Opinion and Order granting partial summary judgment, the district court noted the e-mails from Rogers (ROA 996 n.4), and explained that, although Whitehead had filed an Answer to the original Complaint in which he denied the allegations, "[a]fter that pleading, he has failed or refused to defend the allegations against him, citing his Fifth Amendment privilege." ROA 996.

As the civil case in the court below inched toward trial, it became obvious that Rogers was not going to participate in the trial process or otherwise advocate for Whitehead in any way. As it turned out, back in Oklahoma, on August 18, 2011, a federal indictment in the Western District of Oklahoma was unsealed as to Whitehead, accusing him of ten counts of mail fraud. According to the docket sheet from PACER, the federal criminal case is currently set for jury trial on August 13,

2012, at 9:00 a.m.[5]

As a result, on September 6, 2011, a pleading was filed in the civil case below titled "Joint Motion for Judicial Notice Regarding Assertion of Fifth Amendment Privileges by Defendant Wilbur Delmas Whitehead *d/b/a* Whitehead Production Equipment." ROA 1097. In this pleading, it was asserted that Whitehead had invoked his Fifth Amendment rights, had refused to answer discovery, and would not contest the causes of action against him. ROA 1097.

Based upon this pleading, the district court entered an order on the first day of the bench trial, September 6, 2011, taking judicial notice that Whitehead has asserted his Fifth Amendment rights and has refused to answer discovery; that Whitehead has not contested and will not contest the causes of action asserted against him by Chesapeake and Cash Flow; and that if called as a witness in the trial of the case, Whitehead would assert his Fifth Amendment rights and refuse to provide testimony per the pre-trial hearing held on September 1, 2011. ROA 1110-11.

In addition, Rogers did not participate in the bench trial in any significant way. On the first day of the bench trial on September 6, 2011, Rogers was asked by the district court if he was going to stay for the proceedings. ROA 1160. Rogers responded: "No, ma'am. If I can be excused, I signed a stipulation. And if I could

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[5] Whitehead is being prosecuted by the federal government in the case styled *United States v. Whitehead*, No. 11-cr-273-M (W.D. Okla.).

be excused to go to other courts, but I'll be available by phone to come over here if something arises." ROA 1160. With that, Rogers was excused from the bench trial and was never heard from again. ROA 1161-62.

RULE 60(b) MOTION

In light of the foregoing, it came as absolutely no surprise to anyone that Chesapeake and Cash Flow were awarded a large judgment against Whitehead—anyone, that is, except W.D. Whitehead. Whitehead asserts that he knew nothing about the summary judgment motion or the judgment entered against him until October 17, 2011—after the bench trial had been completed and on the very day that the huge judgment had been filed against him. ROA 1381.

In contrast to the representations made by Rogers in the district court, Whitehead has expressed a different view in his motion for relief pursuant to Rule 60(b). ROA 1380.[6]

[6] In his Motion, Whitehead, proceeding *pro se*, attacked primarily the fact that Rogers had confessed the motion for summary judgment filed by Chesapeake. However, Whitehead did request that the district court "enter an order reversing summary judgment *and denying any judgment in this case* upon the grounds and for the reasons that Wilbur Delmas Whitehead was denied due process of law because of the refusal of his lawyer to advise him and upon the grounds of gross negligence involving legal malpractice[;]" and also "Wilbur Delmas Whitehead asks the Court to *reverse judgment in this case and reverse the Court's order granting summary judgment* upon the grounds and for the reasons that extraordinary circumstances demand that in the interest of justice this matter be reversed." ROA 1380, 1383 ¶ 12. Thus, Whitehead asserts that he has sufficiently contested not only the entry of (partial) summary judgment, but also the judgment as a result of the bench trial.

Whitehead asserts that he in fact never authorized Rogers (and another attorney whom Whitehead hired to defend the civil case) to agree to summary judgment against him, was never advised *by* Rogers concerning the legal aspects and risks associated with summary judgment, and more importantly, Whitehead asserts that he has a defense to the case: that he in fact delivered the Fat Boy separators at issue here and he has evidence to support that defense. ROA 1380-81.

The evidence proffered by Whitehead includes an affidavit from Eddie Galvan. ROA 1437. Galvan was an employee of Whitehead who stated in his affidavit that he in fact welded 30-40 of the Fat Boy separators during the time that he worked for Whitehead from 2008 through April 23, 2010. *Id*. He also stated that Lee Whitehead loaded the Fat Boy separators onto an 18-wheeler and delivered them. *Id*.

In addition, Whitehead submitted an affidavit from Everett Lee Whitehead. Lee Whitehead worked for W.D. from October, 2006, through April, 2010. ROA 1439. Lee was a truck driver for W.D. *Id*. According to Lee's affidavit, he delivered equipment to all parts of Texas, including many deliveries to Cleburne, Texas, of 48" separators (the Fat Boys). *Id*. Lee made deliveries to several locations in Cleburne, Texas. *Id*.

Finally, Whitehead asserted a discrepancy concerning deposition testimony from Glenn Stetson (the Chesapeake employee who took over at the Cleburne, Texas,

field office when Kyle Willey was fired) that appears to be contrary to the assertions made by Chesapeake in its motion for summary judgment accusing Whitehead of failing to deliver the Fat Boy Separators. ROA 1381.

Of course, no lawyer for Whitehead attended the discovery deposition of Glenn Stetson, so his testimony was necessarily elicited by the lawyers for Chesapeake and Cash Flow. In his deposition, Stetson brought up the obvious fact that since wells in the area were "flowing" it meant without a doubt that there is a separator on the well. ROA 1387. The well could not be "flowing" without a separator. *Id*.

Then, Stetson was asked the obvious follow-up question: "How do you know what separator was on there, whether it was a Whitehead separator or somebody's else [sic] separator?" ROA 1387. Stetson's answer: "I assumed." *Id*.

Moreover, Chesapeake had no procedure in place whereby a person would go out to the well and make sure that the separator matched the invoice. ROA 1388. The reason is that verifying these things would be too time-consuming. *Id*.

As to the Comtek audit, which was relied upon by Chesapeake to show that no Fat Boy separators from Whitehead were found in the oil wells in Johnson County, Stetson made the rather remarkable admission that there were in fact separators from Whitehead on some of the wells. ROA 1389-90.

Thus, it is clear that Whitehead had a defense to the allegations made by

Chesapeake; at the very least there is a fact question as to whether Whitehead actually delivered the Fat Boy separators at issue; and there appears to be at least a reasonable likelihood that fired employee Kyle Willey and a confederate committed fraud by receiving the Fat Boys from Whitehead and then re-selling them without Chesapeake's knowledge.

As in every contested case, listening to one side of the story is often persuasive. It is only when one considers the facts and argument from the litigant's adversary that the true questions emerge. In this case, Chesapeake and Cash Flow were represented by capable counsel who advocated their legal interests hard. Whitehead had, in effect, no representation at all.

The district court was not persuaded by the evidence and argument made by Whitehead in his Motion for relief pursuant to Rule 60(b), and it denied the motion. ROA 1466. Whitehead asserts that the judgment against him was the result of a process that was illegitimate, fundamentally unfair, and correction by this Court is required.

SUMMARY OF THE ARGUMENT

Whitehead hired counsel to represent him in this case. Rather than investigate the case and prepare a defense, counsel told the court that Whitehead would invoke the Fifth Amendment and not participate at all. That is exactly what happened.

Neither Whitehead nor counsel attended depositions, no objections or other pleadings were filed that contested any important issue in the case–other than a general Answer in response to the Complaint–and at the bench trial itself, defense counsel showed up, announced that Whitehead would invoke the Fifth, *and then he left the courtroom without participating in the trial*.

This acquiescence by trial counsel did not result from discussions with Whitehead, nor did Whitehead consent to the strategy of invoking his Fifth Amendment rights and not contesting the allegations against him, nor was Whitehead even *aware* that a judgment in excess of $3 million had been entered against him until after the bench trial, and after the judgment had been filed.

Whitehead in fact has a factual defense to the allegations, which he presented in the form of affidavits and documents to the district court in his Rule 60(b) motion. Because he has a defense, and because the judgment against him was the result of an illegitimate and non-adversarial process, Whitehead is entitled to relief from the judgment below.

ARGUMENT AND AUTHORITIES

ISSUE I

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING WHITEHEAD'S RULE 60(b) MOTION BECAUSE THE JUDICIAL PROCESS BELOW WAS ILLEGITIMATE AND NOT THE PRODUCT OF AN ADVERSARIAL PROCESS.

This Court reviews the denial of a motion to vacate a judgment pursuant to Rule 60(b) for an abuse of discretion. *Williams v. Thaler*, 602 F.3d 291, 312 (5th Cir. 2010) (the decision to grant or deny relief under Rule 60(b) lies within the sound discretion of the district court and will be reversed only for abuse of that discretion).

Rule 60(b) provides, in relevant part:

> (b) Grounds for relief from a final judgment, order, or proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> ...
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> ...
>
> (6) any other reason that justifies relief.

Whitehead asserts that the district court's denial of his Rule 60(b) motion violates all three subsections. The actions of Rogers and Whitehead's other counsel

did not constitute *excusable* neglect. Although Rogers stated Whitehead acquiesced to the strategy of invoking the Fifth and not defending the case, Whitehead has asserted otherwise in his Rule 60(b) motion. According to Whitehead, his counsel not only failed to investigate his case and advocate his cause, they also misrepresented the fact that Whitehead agreed to that course of action.

Moreover, the deposition testimony of Glenn Stetson at least raises a question concerning whether in fact there are Whitehead-made Fat Boy separators operating at wells owned by Chesapeake in Johnson County, Texas. The affidavits of Galvan and Lee Whitehead, at a minimum, create a question of fact on the key issue of whether the separators were delivered to Chesapeake. This previously undisclosed evidence undermines summary judgment; and the fact that trial counsel failed to present this evidence at the bench trial to refute the allegations of Chesapeake undermines the entire legitimacy of the judicial proceedings below.

This Circuit has stated that where a party submits previously undisclosed evidence that is so central to the litigation that it shows the initial judgment to have been manifestly unjust, relief under Rule 60(b)(6) may be proper, even though the original failure to present that information was inexcusable. *Good Luck Nursing Home, Inc. v. Harris,* 636 F.2d 572, 577 (5th Cir.1980). This legal standard has been met in Whitehead's case.

Good Luck involved a summary judgment order in a civil case, where a medicare provider sought reimbursement of certain expenses. The district court granted summary judgment in favor of the provider, but the Government moved to vacate that judgment pursuant to Rule 60(b)(6) based upon the existence of facts unknown previously to the court that were material to the legal question involved. This Court approved of the use of Rule 60(b)(6) in these circumstances since the undisclosed evidence was disruptive of the rationale used in the summary judgment determination; and this was so even in a case such as Whitehead's where the failure to disclose the information in the first place was inexcusable. *Good Luck,* 636 F.2d at 577.

Instructive, too, is the opinion of the Supreme Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). In *Liljeberg*, the Supreme Court approved of the application of Rule 60(b)(6) to vacate a final judgment where it was found that the partiality of the judge could reasonably have been questioned. The Court recognized that the criteria governing relief via Rule 60(b)(6) is vague, stating that the Rule does not particularize the factors that justify relief, but the Supreme Court had noted previously that the Rule does provide courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Liljeberg*, 486 U.S. at 863-64.

Liljeberg is instructive in at least two ways. First, the Supreme Court stated that in circumstances where the impartiality of the trial judge may be questioned, it is appropriate to consider the risk of injustice to the parties in the case, any risk of injustice to parties in other cases, and the risk of undermining the public's confidence in the judicial process–since courts must continuously bear in mind that "to perform its high function in the best way justice must satisfy the appearance of justice." *Id*. at 864 (*citing In re Murchison*, 349 U.S. 133 (1955)).

These considerations are present in Whitehead's case. The risk of injustice to Whitehead is significant. He is subject to a judicial determination that his fraudulent conduct resulted in loss in excess of $800,000, and he was hit with punitive damages greater than that. This Court cannot have confidence that this is a just result based upon the allegations made by Whitehead in his Motion.

There is a significant likelihood that he has a defense; and he is going to defend vigorously what amount to the same allegations in a pending federal criminal case in Oklahoma. To allow the civil judgment to stand under those circumstances, where there was no adversarial process–and in fact acquiescence on the part of Whitehead's advocate–does not satisfy the appearance of justice and would erode public confidence in the judicial system if the courts were to allow it to stand.

Second, *Liljeberg* involved a case where one of the trial actors–the trial

judge–had a conflict of interest that caused his role in the process to be questioned, thereby undermining the legitimacy of the process by which an ultimate and final judgment as rendered. Similarly, Whitehead has alleged and shown that one of the essential trial actors at his trial–his counsel–acted in such a way as to concede his interests when it was neither warranted nor consented to by Whitehead. This makes the final judgment against Whitehead at least as suspect as the final judgment in *Liljeberg*.

Whitehead also objects to being bound by the decisions of his counsel to concede the allegations and forego a defense because those decisions were patently unreasonable under the circumstances, and undertaken without consultation with Whitehead and without a knowing and intelligent understanding by Whitehead of the risks or a waiver of those known risks. No rational litigant or professional advocate would affirmatively agree to summary judgment against himself to the tune of over $3 million, or forego his right to have a jury decide the case; yet, that is exactly what Rogers did in this case. *See*, *e.g.*, *Heyman v. Kline*, 456 F.2d 123, 129 (2nd Cir. 1972) (right to jury trial is fundamental and cannot be waived without the consent of the client); *see also Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (the right of jury trial is fundamental and courts must indulge every reasonable presumption against waiver).

The central legal deficiency in this case is that none of the factual support presentation in the case below was the product of a true adversarial process. One of the actors that makes the system work–the defense lawyer–compromised the process in a way that does not satisfy the appearance of justice. This Court has characterized Rule 60(b)(6) as "a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses." *Williams*, 602 F.3d at 311; *Matarese v. LeFevre*, 801 F.2d 98, 106 (2nd Cir. 1986). Relief under this section requires "extraordinary circumstances." *Id*.

Such circumstances are present here because, as this Court has stated, Rule 60(b)(6) was intended "to preserve the delicate balance between the sanctity of final judgments...and the incessant command of the court's conscience that justice be done in light of all the facts." *Good Luck*, 636 F.2d at 577. Forcing a litigant such as Whitehead to bear the cost of crushing money judgment without a fair adversarial process is not justice in light of the facts.

Nor can Whitehead's adversary rely upon the principle of *Ackerman v. United States*, 340 U.S. 193 (1950), wherein the Supreme Court held that the extraordinary circumstances of Rule 60(b)(6) did not offer a litigant any quarter where he made free, calculated strategic decisions during the course of a litigation that turned out, in hindsight, to be improvident.

Ackerman involved co-defendants fighting an immigration case. They lost in the court below, but one of them sought an appeal, while Ackerman decided to save his money and not file an appeal. As luck would have it, the co-defendant won his case on appeal, which was a decision that would result in relief for Ackerman. When Ackerman tried to vacate the judgment using Rule 60(b), the Supreme Court denied it, holding that Ackerman must live with the choices that he made.

Here, Whitehead contests that he made any choices to abandon his rights, agree to summary judgment, agree to waive a jury trial, and for forego any defense to the claims made against him. These decisions were made by his counsel without his authorization or consent, and Whitehead views them as invalid.

As this Court stated in *Good Luck*, a court is not powerless to correct errors when the errors were the result of the failure of a party to make known key facts that are central to the litigation. *Good Luck*, 636 F.2d at 577. In Whitehead's case, the deficiencies of counsel included not only a failure to make known key facts (the affidavits of Galvan and Lee Whitehead, and the deposition of Glenn Stetson), but also a complete abdication of his duty as an advocate to defend and try the case, all done without consultation or consent by Whitehead.

Under these circumstances, the district court erred in denying Whitehead's motion pursuant to Rule 60(b).

CONCLUSION

For the foregoing reasons, Whitehead moves this Court to reverse the district court with instructions to grant his motion pursuant to Rule 60(b) to vacate the judgment below, and to remand this matter for a jury trial on the merits; or in the alternative, to remand this matter for an evidentiary hearing so that Whitehead can support the factual allegations made in his motion to the extent that they are contested by his party opponents.

DATED this 30th day of April, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 30th day of April, 2012, a true and correct copy of the above **BRIEF FOR APPELLANT** was served via ECF and e-mail to the following ECF registrants:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Brief contains **5,841** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally-spaced typeface using Corel WordPerfect 12 word-processing software, to wit: 14-point Times New Roman font.

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DATED this 30th day of April, 2012.