

NO. 11-41349

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHESAPEAKE OPERATING, INC.,
Plaintiff-Appellee,

VS.

WILBUR DELMAS WHITEHEAD, d/b/a Whitehead Production Equipment,
Defendant-Appellant,

VS.

CASH FLOW EXPERTS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Corpus Christi Division
The Honorable Nelva Gonzales Ramos, United States District Judge
District Court No. C-10-301

**BRIEF OF APPELLEE, CASH FLOW
EXPERTS, INC.**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee, Cash Flow Experts, Inc., 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, Individually and d/b/a Whitehead Production Equipmant, Appellant.
2. James L. Hankins, Hankins Law Office, Appellate counsel for Appellant.
3. Richard W. Rogers, III, Law Offices of Richard W. Rogers, Trial counsel for Appellant.
4. Garvin A. Isaacs, Jr., Garvin A. Isaacs, Inc., counsel for Appellant in Cause No. 11-cr-273-M, pending before the Western District of Oklahoma.

FOR THE APPELLEE (Chesapeake Operating, Inc.)

1. Chesapeake Operating, Inc., Appellee.
2. Jesse R. Pierce, Brian Kevin Tully, Pierce & O'Neill, LLP, Trial and Appellate counsel for Chesapeake.

FOR THE APPELLEE (Cash Flow Experts, Inc.)

1. Cash Flow Experts, Inc, Appellee.
2. David H. Crago, Crago Law Firm, Trial and Appellate Counsel for Cash Flow.
3. Thomas F. Nye, Gault, Nye & Quintana, LLP, Appellate Counsel for Cash Flow.

STATEMENT ON ORAL ARGUMENT

The factual and legal issues raised in this appeal are not complex and have been adequately addressed by the written briefs filed by Whitehead, Chesapeake and Cash Flow. Counsel for Cash Flow Experts, Inc., believes that oral argument would not benefit the Court and respectfully requests that oral argument be denied.

/s/ Thomas F. Nye

Thomas F. Nye

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STATEMENT OF JURISDICTION

Cash Flow acknowledges that this Court has jurisdiction over this appeal. Jurisdiction is not contested in this matter.

STATEMENT OF THE ISSUES

Whether the district court abused its discretion in denying Whitehead's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b).

STATEMENT OF THE CASE

Chesapeake Operating, Inc., (“Chesapeake”) filed the underlying lawsuit on September 15, 2010, alleging that Wilbur Delmas Whitehead d/b/a Whitehead Production Equipment (“Whitehead”) committed fraud and breach of contract relating to the sale of oilfield equipment. Whitehead appeared and answered through counsel. Chesapeake amended its complaint on November 4, 2010, adding Cash Flow Experts, Inc., (“Cash Flow”) as an additional defendant.

On June 15, 2011, Chesapeake filed a Motion for Summary Judgment on its breach of contract claims against Whitehead and Cash flow. Cash Flow also filed a Motion for Partial Summary Judgment on claims that Whitehead was required to indemnify Cash Flow for any damages it may owe to Chesapeake. The trial court partially granted Chesapeake’s motion summary judgment against Whitehead, but denied Chesapeake’s summary judgment motion against Cash Flow. The trial court further granted Cash Flow’s motion for summary judgment against Whitehead.

A bench trial was held on the remaining issues between Chesapeake and Cash Flow on September 6, 2011. The trial court entered findings of fact and conclusions of law on September 19, 2011. On October 17, 2011, the trial court entered a final judgment awarding Chesapeake damages from Cash Flow and Whitehead, awarding Cash Flow damages from Whitehead, and ordering

Whitehead to indemnify Cash Flow.

On October 25, 2011, Whitehead, acting *pro se*, filed a Rule 60(b) motion to vacate the trial court's judgment. Whitehead's motion was denied on November 15, 2011. This appeal ensued.

STATEMENT OF FACTS

Whitehead was engaged in the business of manufacturing oil field equipment for production companies in the oil industry. R1139-40. Chesapeake Operating, Inc., a customer of Whitehead, is an oil field and oil energy company with its principal place of business located in Oklahoma City, Oklahoma. *See* R1139. It owns, operates and produces oil and gas wells in many Texas counties and internationally. *See id.*

Cash Flow Experts, Inc. is a Texas Corporation which is engaged in the business of "factoring," or purchasing unpaid invoices and accounts receivable at a discount for a percentage of the face value of the invoice. R1140. Cash Flow entered into a Factoring and Security Agreement with Whitehead whereby Cash Flow began factoring accounts receivable for Whitehead in April 2008. R445-54, 1140. Whitehead completed a client application providing personal and banking information, a factoring and security agreement, and a personal guarantee. R1007.

As part of the factoring arrangement with Whitehead, Cash Flow conducted due diligence prior to funding invoices by contacting Chesapeake to verify

Whitehead's and Chesapeake's business relationship and to further put Chesapeake on notice as to the factoring arrangement with Cash Flow Experts, Inc. R452-53. During the ordinary course of business, Chesapeake paid invoices to Cash Flow for over eighteen months. R1141. Cash Flow received Chesapeake's last payment on September 23, 2009. *Id.*

Cash Flow communicated regularly with Chesapeake through several Chesapeake employees, including Kyle Willey, one of Chesapeake's duly authorized representatives, who would sign off on Whitehead's invoices, indicating that Chesapeake had approved payment of these invoices. R993. Cash Flow paid Whitehead for the invoice less certain agreed advance expenses. R445-54, 993. Cash Flow then invoiced Chesapeake for payment directly to Cash Flow. *Id.*

After making 23 payments to Cash Flow, Chesapeake stopped payment on Whitehead's invoices upon learning that the ordered equipment was not being delivered. R1141-42. Chesapeake did not pay eight additional invoices. *Id.*

Chesapeake sued Whitehead on September 15, 2010, and joined Cash Flow as a defendant on November 4, 2010. R13, R55. The district court granted Chesapeake partial summary judgment on its breach of contract claims against Whitehead on August 26, 2011. R992. The district court also granted Cash Flow's motion for partial summary judgment against Whitehead, ruling that Cash Flow was entitled to indemnity by Whitehead. R1006.

A subsequent bench trial was held on the following unresolved claims: (1) Chesapeake's claims against Cash Flow for money had and received, and (2) Chesapeake's and Cash Flow's claims against Whitehead for fraud. On October 17, 2011, the district court entered a final judgment awarding Chesapeake and Cash Flow actual and punitive damages against Whitehead. R1378-79. The judgment also awarded Chesapeake actual damages against Cash Flow, and ordered that Whitehead indemnify Cash Flow. *Id.*

Following the judgment, Whitehead filed a Fed. R. Civ. P. 60(b) motion seeking to set aside the judgment based on alleged negligence of his trial counsel. The district court denied Whitehead's motion on November 15, 2011, and this appeal ensued.

SUMMARY OF THE ARGUMENT

The district court properly denied Whitehead's Rule 60(b) motion because legal malpractice claims are not proper grounds for relief under this rule.

Pursuant to Federal Rule of Appellate Procedure 28(i), Cash Flow adopts by reference Chesapeake's arguments in its Brief in support of the trial court's denial of Whitehead's Rule 60(b) motion.

Cash Flow does not challenge the district court's summary judgment orders or its final judgment. If this Court, however, reverses either the summary judgment orders or the district court's final judgment based on Whitehead's Rule

60(b) motion, Cash Flow respectfully requests that this Court vacate both the district court's August 26, 2011, summary judgments and the October 17, 2011, Final Judgment.

ARGUMENT & AUTHORITIES

I. Standard of Review

Rule 60(b) motions are directed to the sound discretion of the district court, and the denial of relief will be set aside on appeal only for an abuse of discretion. *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1082 (5th Cir. 1984). It is not enough that the granting of relief might have been permissible, or even warranted—denial must have been so unwarranted as to constitute an abuse of discretion. *Id.*

II. The District Court Properly Denied Whitehead's 60(b) Motion.

A. Whitehead is Not Entitled to Rule 60(b) Relief.

1. Ineffective Assistance of Counsel is not a Proper Ground for Rule 60(b) Relief.

Whitehead's basic claim on appeal is that the district court should have granted his Rule 60(b) motion due to his trial counsel's alleged legal malpractice.¹

Whitehead fails, however, to cite a single case supporting his contention that legal malpractice claims form a valid basis for 60(b) motions. In fact, Whitehead's

¹ Cash Flow in no way asserts, agrees or suggests that Whitehead's trial counsel's actions were negligent or inappropriate in any way. In this brief, Cash Flow merely responds to Whitehead's allegations.

legal authority undermines the very appellate arguments upon which he relies. Whitehead cites *Williams v. Thaler*, 602 F.3d 291 (5th Cir. 2010), for the proposition that Rule 60(b) is a “grand reservoir of power” (Appellant’s Brief, at 22). The *Williams*’ Court, however, held that “ineffective assistance of counsel will not suffice” to show extraordinary circumstances warranting Rule 60(b) relief. *Williams*, 602 F.3d at 312 (citations omitted).

Contrary to his appellate arguments, Whitehead’s malpractice allegations do *not* entitle him to Rule 60(b) relief. “The mistakes of counsel, who is the legal agent of the client, are chargeable to the client ... no matter how ‘unfair’ this on occasion may seem.” *James v. Rice Univ.*, 80 Fed. Appx. 907, 911 (5th Cir. 2003) (quoting *Pryor v. U.S. Postal Service*, 769 F.2d 281, 288 (5th Cir. 1985)) (Trial counsel’s neglect was not grounds for relief under Rule 60(b)).

In essence, Whitehead raises three Rule 60(b) arguments on appeal that this Court previously rejected in *Crutcher*: “(i) no opportunity to present his case on the merits; (ii) the ineptness of his prior counsel; and (iii) a huge judgment taken against him.” *Compare Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1083 (5th Cir. 1984) *with* Whitehead’s brief at 11-12, 14, and 18. In rejecting all of these claims, this Court stated: “Rule 60(b) was not designed to operate as an insurance mechanism for clients. Its purpose is not to give relief to the client who does not choose the best lawyer for the job. * * * [And,] a party cannot have relief under

Rule 60(b)(1) merely because he is unhappy with the judgment.” *Crutcher*, 746 F.2d at 1083 (quoting *United States v. O’Neil*, 709 F.2d 361, 373 (5th Cir. 1983)).

Whitehead, like *Crutcher*, “was represented by an attorney of his choice.” *Id.*, at 1082. Whitehead’s attorney informed the parties that he had been instructed not to contest the motion for summary judgment or file any response. R899. He also appeared and announced ready for trial. R1160. He then asked to be excused because he had signed a stipulation stating that Whitehead was asserting his Fifth Amendment rights and would not contest the allegations against him. R1097, 1160-61.

“Cases grant relief for attorney incompetence only where that incompetence deprives the party of an opportunity to present the merits of his case.” *Crutcher*, 746 F.2d at 1082-83 (Rule 60(b) motions liberally construed when counsel’s abandonment of a client causes a default judgment.). Like *Crutcher*, Whitehead had the opportunity to present his case, but, through his attorney, elected to assert his Fifth Amendment rights and further elected not to participate in the summary judgment hearing and trial. Here, there was no evidence of abandonment, nor was a default judgment entered. Rather, Whitehead’s attorney followed his client’s instructions. Whitehead’s attorney did not prevent Whitehead from presenting the merits of his case.

2. Whitehead Presented No Evidence to Support His Legal Malpractice Claims.

Even assuming, *arguendo*, that Whitehead has a legal malpractice claim against his trial counsel, Whitehead presented no evidence to support his wild allegations. Whitehead asserts in his brief that “[a]lthough [his attorney] 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*” (Appellant’s Brief, at 18) (emphasis added). Nowhere in his Rule 60(b) motion does Whitehead allege specifically that he instructed his attorney not to assert his Fifth Amendment rights or that his attorney acted contrary to Whitehead’s expressed desires. R1380-84.

Further, Whitehead’s Rule 60(b) motion is unverified, and there is no affidavit or other evidence to support Whitehead’s bold claims. Whitehead was the best, if not the only, source of evidence to support the allegation that his attorney acted contrary to his expressed instructions. Whitehead, however, did not verify these allegations. *See Smith v. Johnson*, 247 F.3d 240 (5th Cir. 2001) (not designated for publication) (“Although Smith alleged in his Rule 60(b) motion that he had an IQ of 75 and an educational level of 3.9, he never verified, for example through an affidavit, that these facts were reliable.”). The district court here had no evidence before it to substantiate Whitehead’s claim that his trial counsel acted improperly and contrary to his expressed instructions.

Because the law does not authorize a Rule 60(b) motion based on legal malpractice and because there is no evidence that Whitehead's counsel committed malpractice, the trial court clearly did not abuse its discretion in denying Whitehead's Rule 60(b) motion. The trial court's ruling denying Whitehead's motion should be upheld.

3. The Evidence attached to Whitehead's Motion Provides No Basis for Relief.

Whitehead further argues that, through the inaction of his counsel, favorable evidence was not presented to the district court. Whitehead cites *Good Luck Nursing Home v. Harris*, in which the Court of Appeals for the D.C. Circuit affirmed the lower court's granting of a Rule 60(b) motion when newly discovered evidence was discovered after judgment was entered. 636 F.2d 572 (D.C. Cir. 1980).

Whitehead, however, does not cite to any "newly discovered" evidence in this case. In his Rule 60(b) motion, Whitehead attaches affidavits of his own employees that he now claims raise a fact issue that the equipment in question was delivered. There is no allegation or proof that this information was "newly discovered" or unavailable to Whitehead or his attorney prior to the entry of the judgments below. Whitehead also references a deposition that was taken in the case below.

Further, Whitehead's arguments are not supported by even his own

authority. The court in *Good Luck* held that “a party that has stipulated to certain facts or *has not presented known facts helpful to its cause when it had the chance* cannot ordinarily avail itself on rule 60(b) after an adverse judgment has been handed down.” *Good Luck*, 636 F.2d at 577 (emphasis added). The deposition testimony was indisputably known to the parties prior to the entry of judgment, and Whitehead knew or should have known of the testimony of employees who were under his control.

Whitehead offered no proof of any “newly discovered” evidence. Whitehead or his trial counsel’s failure to present this evidence to the district court is not grounds for Rule 60(b) relief. The district court did not abuse its discretion in denying Whitehead’s Rule 60(b) motion; this Court should affirm the district court’s ruling.

B. This Case is Not Analogous to the Questionable Impartiality of the Judge.

Whitehead also relies on the United States Supreme Court decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The trial judge in *Liljeberg* was a trustee of a university that had an interest in the outcome of litigation pending before him. *Id.*, at 850. The Supreme Court affirmed relief under Rule 60(b) to avoid the appearance of impropriety because the impartiality of the district court judge could have been reasonably called in to question. *Id.*, at 861.

Whitehead attempts to shoehorn his case into an analogous scenario wherein the allegedly improper actions of his attorney give the appearance of impropriety in the judicial system. *Liljeberg* is inapplicable, however, because as explained above, Whitehead voluntarily chose his attorney, and his attorney's actions are chargeable to him. *See Pryor*, 769 F.2d at 288 (“The mistakes of counsel, who is the legal agent of the client, are chargeable to the client ... no matter how ‘unfair’ this on occasion may seem.”). These allegedly improper actions are not a reflection on the district court or the judiciary.

Thus, the appearance of impropriety in the judicial system is not an appropriate ground to grant Whitehead relief under Rule 60(b). The district court properly denied Whitehead's motion. There was no abuse of discretion.

C. Cash Flow Adopts Chesapeake's Arguments in Favor of Affirming Trial Court's Judgment.

Pursuant to Federal Rule of Appellate Procedure 28(i), Cash Flow adopts and incorporates by reference those arguments and authorities in Chesapeake's Brief arguing in favor of affirming the district court's judgment.

III. Alternatively, if This Court Sets Aside any Judgment of the District Court Below, All Judgments Should be Vacated.

Alternatively, in the unlikely event that this Court finds Whitehead is entitled to relief from the district court's August 26, 2011, summary judgment orders or the October 17, 2011, Final Judgment, this Court should set aside all

judgments and all summary judgment orders in their entirety.

CONCLUSION AND PRAYER

Whitehead has not shown himself entitled to relief under Federal Rule of Civil Procedure 60(b). The district court properly denied Whitehead's motion.

WHEREFORE, premises considered, Appellee, Cash Flow Experts, Inc., respectfully requests that this Court affirm the district court's August 26, 2011 summary judgments and the October 17, 2011 Final Judgment. Alternatively, in the unlikely event that this Court finds Whitehead is entitled to relief from the district court's August 26, 2011, summary judgment orders or the October 17, 2011, Final Judgment, this Court should set aside all judgments and all summary judgment orders in their entirety. Cash Flow further prays for such other and further relief, in law and in equity, to which it may be justly entitled.

Respectfully submitted,

/s/ Thomas F. Nye

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on the following counsel of record on the 19th day of June, 2012, via ECF and email to the following parties.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned certifies that this Brief complies with the page and type-volume limitations of Fed. R. App. P. 32(a) because:

1. This Brief contains 2,668 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. 23(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 Times New Roman 14-point font in the text and 12-point font in the footnotes.

/s/ Thomas F. Nye

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