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

REPLY BRIEF
OF APPELLANT WILBUR DELMAS WHITEHEAD

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REPLY TO STATEMENT OF THE FACTS

The factual record in the district court below, apart from the materials attached in the Rule 60(b) motion filed by Whitehead, is decidedly in favor of Chesapeake. As Whitehead pointed out in his Brief-in-chief, this is hardly surprising since Whitehead's counsel not only failed to contest the allegations, but in fact actively assisted Chesapeake in obtaining a huge judgment against Whitehead by agreeing to summary judgment, not investigating any of the facts, not presenting a defense, and literally abandoning Whitehead at the bench trial (counsel literally showed up on the morning of trial and then asked to leave).

In this posture, Chesapeake regurgitates its own essentially uncontested factual allegations and then asserts that "[t]he inescapable conclusion was that Chesapeake had therefore paid for equipment that it had never received." Chesapeake Brief at 11. Whitehead would point out to this Court the irony of that statement in light of footnote 2 immediately below it.

In this ignominious footnote, Chesapeake cites the inventory conducted by Contek in order to determine whether any Fat Boy separators manufactured by Whitehead were possessed by Chesapeake. Chesapeake acknowledges that not even its own handpicked auditor could get it exactly right, stating "some items on the Contek inventory suggested that there were a Fat Boy separator manufactured by Whitehead at a handful of properties, but personal visits to these properties revealed that this was an error in the Contek report[.]"

From its view of the facts (compiled largely by Chesapeake in the court below without an adversarial process) Chesapeake asserts that the district court below analyzed the merits of the issues. *See* Chesapeake Brief at 16. Although that is true, as far as it goes, it also illustrates the central point of this case: the analysis by the district court was skewed in favor of Chesapeake because the process used to develop the facts was non-adversarial. Whitehead showed why this was so in his Rule 60 motion, and it is for this reason that the district court abused its discretion.

REPLY TO 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.

Whitehead recognizes that there is no Sixth Amendment right to the effective assistance of counsel in a civil case, and that 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). This is the reason that Whitehead has appealed to this Court on the issue of the denial of his Rule 60 motion, rather than asserting a Sixth Amendment claim.

It is puzzling, then, why Chesapeake addresses the propriety of the Sixth Amendment and its questionable application to this case. *See* Chesapeake Brief at 24-28. Chesapeake makes the dubious argument that this Court need not even consider the errors of Whitehead's counsel because, if true, "they would only give rise to a separate legal malpractice suit against the lawyer, and would provide no basis for appellate relief whatsoever." Chesapeake cites no authority for this statement, and indeed it is completely unsupportable by any citation to law.

As to the heart of the matter—whether Whitehead's allegations that his counsel did not carry out his wishes, and whether Whitehead has a factual

defense—Chesapeake is dismissive of the affidavits and allegations made by Whitehead, charging that "the affidavits raise more questions than they answer." Chesapeake Brief at 29. That may be so, but squelching questions that arise from the affidavits is not the criterion by which the affidavits are to be judged in the Rule 60 context.

The affidavits filed by Whitehead accomplish nicely what they are supposed to do, which is to show this Court the serious questions that surround whether Whitehead in fact manufactured and delivered the separators, whether defense counsel abdicated his duty to defend the case, and whether the district court's factual conclusions in the case below are now in doubt.

Chesapeake purports to be unsure about what the affidavits even mean, telling this Court that "[u]pon reading them, it is not even clear what Whitehead hopes to prove by these affidavits[.]" Chesapeake Brief at 29. Whitehead detects a rhetorical flourish in this statement since this case is not about rocket science, rather it is about whether some oilfield equipment was delivered. Whitehead proffered the affidavits in support of his Rule 60 motion to show that there is a factual basis for him to assert that he in fact manufactured and delivered them to Chesapeake.

Chesapeake poses some of the questions raised by the affidavits (*see* Chesapeake Brief at 30), apparently in an attempt to suggest to this Court that there

is no real question about the central facts in this case. However, the questions posed by Chesapeake do the opposite because they simply illustrate how the adversarial process collapsed in this case, and how the resultant judgment is suspect.

Whitehead reminds this Court again that the criminal case against Whitehead is scheduled for jury trial on Monday, August 13, 2012, in the United States District Court for the Western District of Oklahoma, in a case styled *United States v. Whitehead*, No. 11-cr-273-M. At this time, even though a plea offer has been extended by the United States, Whitehead fully intends to present a defense to the charges before a federal jury, and to defend the case vigorously.

The affidavits that Whitehead attached in support of his Rule 60 motion do not constitute the entire universe of proof or witnesses that Whitehead intends to call at his criminal trial; however, they do show this Court that the proceedings below in this civil case were not the result of legitimate adversarial testing.

Concerning the discrepancies in the Stetson deposition, as with the Contek report, Chesapeake has an explanation as to why Stetson thought that the Fat Boy separators had been delivered. *See* Chesapeake Brief at 31. The explanation (that Stetson simply assumed, since he knew that the wells would not work without the separators) of Stetson's remarks, as with the Contek report, all presuppose that no employee or official from Chesapeake was involved in committing fraud.

In other words, Chesapeake presupposes that the separators were not delivered by Whitehead, and then provides explanations for the uncomfortable statements by Stetson and reports by Contek that do not consider any culpability on the part of anyone associated with Chesapeake. The Court can see how the lack of an adversarial process impugns the judgment.

In this vein, Chesapeake asserts–without citation to authority–that Cash Flow had incentive to show that Whitehead delivered the separators, and thus the underlying lawsuit was adversarial. *See* Chesapeake Brief at 32-34. The fact that Cash Flow may have been motivated to advocate interests similar to those of Whitehead does not transform a plainly non-adversarial proceeding into a hard-fought adversarial trial. Cash Flow may have had similar motives to contest liability, but it did not have access to the Whitehead's employees or records, and it certainly did not present a factually intensive defense before the district court, or raise any concerns about how Whitehead's counsel was simply conceding the case.

Finally, Chesapeake dismisses Whitehead's legal authority as unpersuasive. *See* Chesapeake Brief at 35-37. In particular, Chesapeake finds the decisions in *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572 (D.C. Cir. 1980)[1] and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) to be inapplicable to this

[1] Counsel did cite *Good Luck* as a Fifth Circuit case in his opening brief, when it is actually a case out of the District of Columbia circuit.

case. However, the legal principles of those cases do apply to Whitehead.

Rule 60 sweeps in broad strokes. Divining the legal principles governing application of Rule 60, and whether those principles apply to Whitehead, is the real chore here. The decision in *Good Luck* is an excellent example of a legal principle found in the Rule 60 context that applies to Whitehead (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)

Chesapeake seeks to blunt this holding by arguing that Whitehead is bound by his counsel's decisions, per *dicta* from this Court in *Lavespere v. Niagara Mach & Tool Works, Inc*., 910 F.2d 167 (5th Cir. 1990). But, *Lavespere* is inapposite for a few reasons.

First, it is a Rule 59 case, not a Rule 60 case. Second, this Court's statement concerning attorney negligence in Rule 60 cases must be tempered by the facts. In *Lavespere*, counsel was actively litigating the case and fighting for his client. He simply failed to attach an important deposition to a motion for summary judgment. Whitehead presents a much different case, one in which counsel did absolutely nothing to assist his client in defending the case (and in fact acquiesced to summary judgment) against the express wishes of Whitehead. It is one thing for a client to rely

on his counsel, and then that counsel simply makes a filing error; it is quite another to be bound by counsel's decisions and actions when that counsel is not advocating the client's case at all and the client wishes for him to do so.

Similarly, the principle in *Liljeberg* applies to Whitehead as well (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). In fact, the Supreme Court recognized what Whitehead has already pointed out—that the criteria governing relief via Rule 60(b)(6) is vague.

The Supreme Court stated that the Rule does not particularize the factors that justify relief, but that the 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. As Whitehead pointed out in his brief-in-chief, *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)).

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 was rendered. 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*.

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 v. Thaler*, 602 F.3d 291, 311 (5th Cir. 2010). Stated another way, 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.

Echoing the Supreme Court's admonition in *Liljeberg*, does justice satisfy the appearance of justice in Whitehead's case? Would a reasonable citizen (or jurist) look at what happened in this case and feel comfortable that a just and equitable result was reached based upon the facts? This is really what it comes down to, and the

answer is evident. Whitehead asserts that he wished to defend himself against the allegations (like he is doing in the criminal case), but that counsel failed to do so against his wishes.

There is no strategy involved that would absolve trial counsel's actions, and to the extent that the conflict between Whitehead and his counsel is unsettled factually, at a minimum this Court must remand for an evidentiary hearing in order to determine whether Whitehead should truly be held to his counsel's decisions in the district court below, whether Whitehead has a factual defense, and whether Whitehead should be bound to a multi-million dollar civil judgment that was the result of a process that was both unreasonable and non-adversarial.

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 5th day of July, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 5th day of July, 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 **2,688** 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 5th day of July, 2012.